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MICHIGAN REPORTS.

REPORTS OF CASES

HEARD AND DECIDED IN THE

SUPREME COURT OF MICHIGAN

FROM

JANUARY 11, 1869, TO JULY 12, 1869.

WILLIAM JENNISON, REPORTER.

VOLUME V.
BEING VOLUME XVIII OF THE SERIES.

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Supreme Court of Michigan.

THOMAS M. COOLEY, Chief Justice.
ISAAC P. CHRISTIANCY,
JAMES V. CAMPBELL,
BENJAMIN F. GRAVES,
Associate Justices.

Judges of Circuit Courts.

FIRST CIRCUIT,
F. JOHNSON.

SECOND CIRCUIT,
*N. BACON.

THIRD CIRCUIT,
JARED PATCHIN.

FOURTH CIRCUIT,
EDWIN LAWRENCE.

FIFTH CIRCUIT,
GEORGE WOODRUFF.

SIXTH CIRCUIT,
JAMES S. DEWEY.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
FLAVIUS J. LITTLEJOHN.

TENTH CIRCUIT,
J. G. SUTHERLAND.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
JAMES O'GRADY.

THIRTEENTH CIRCUIT,
J. G. RAMSDELL.

FOURTEENTH CIRCUIT,
*MOSES B. HOPKINS.

FIFTEENTH CIRCUIT,
——— ———

SIXTEENTH CIRCUIT,
——— ———

*Deceased.

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COURT RULES.

SUPREME COURT.

No. 57. The following fees shall be taxable by parties to the Clerks of the Supreme Court, and payable with other costs in suits:

For all services in a cause heard and decided on the merits, including a certified copy of the final order for the prevailing party, the taxing of costs and the issuing and filing of execution, $6.

In cases not heard and disposed of on the merits, for entering the case on the calendar and filing all papers, $1.

For putting the same on the term docket in pursuance of notice, 50 cents.

For any order dismissing or otherwise disposing of such case, including certified copy, and including all entries and services connected with remitting the record or papers and remanding the case, $1.

In any of the above cases the clerk shall be entitled to demand from any party bringing a case into this court the payment of $2 at the time the case is entered, but the same shall be allowed at the conclusion of the case as part pay ment of the fees above provided.

For all services connected with the admission of any person to the bar, including the usual certificate, $2.

For copies certified under the seal of the court or otherwise, of any entries or papers in any suit or proceeding, when required for any other purpose than for one connected

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with the progress or disposition of such suit or proceeding, 15 cents for each 100 words. *Adopted May 12, 1869.*

AMENDED RULES.

Rules 28 and 42 amended as follows:

No. 28. The priority of causes on the calendar shall depend upon the date of filing the papers therein. The party noticing a cause for hearing shall, at least six days before the first day of the term for which the same is noticed for hearing, give notice to the clerk at the place where the term is to be held, to place such cause on the calendar for the term. No cause shall be entered on the calendar by the clerk until the return transcript or case shall have been filed in this court, nor without the notice to the clerk hereinbefore mentioned.

No. 42. The court, on the first day of each term, after motions are disposed of, will commence calling the cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, and, if the parties or either of them shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go over the term, unless the court on cause shown shall otherwise order. Ten cases only shall be considered liable to be called on each day during the term at Detroit, including the one on argument, if the same shall not have been concluded the preceding day. Causes shall be liable to be called on motion days after the motions are disposed of. No cause shall be taken up out of its order or set down for a particular day, except under special and peculiar circumstances to be shown to the court. On motion days motions will take precedence of calendar causes. *Adopted October 7, 1869.*

CIRCUIT COURT.

No. 102. Whenever in an action of law the defendant interposes a plea in abatement, he may also at the same time plead the general issue; and in such case, if an issue of fact be made on the plea in abatement, such issue shall stand

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for trial first; and, if it be found against the defendant the trial shall at once proceed on the issue on the merits unless the court on cause shown, shall allow a postponement. And if the issue on the plea in abatement is tried by jury, the issue on the merits, except when postponement is ordered, shall stand for trial before the same jury.

When the issue in abatement shall be found for the defendant, the court may in its discretion, allow the plaintiff to amend the declaration, and the cause shall thereupon proceed on such terms as the court shall prescribe. *Adopted May 13, 1869.*

No. 103. Applications for leave to appeal under § 3842 of the Compiled Laws, shall only be heard in the circuit courts on the usual notice required for special motions; and notice thereof shall be accompanied with a copy of the petition or affidavit on which the same is based. *Adopted July 10, 1869.*

No. 104. In order to avoid needless prolixity, inasmuch as policies of insurance are generally issued upon printed forms, of the contents of which the companies issuing them are fully advised, it shall not be necessary hereafter in declaring upon such policies to set forth specifically any more than the date and amount of the policy, the premium paid or to be paid, the property or risk insured and the loss; and upon the trial, proofs may be made in the same way as if the declaration had set forth the policy in full. And in case the company or person issuing such policy shall rely, in whole or in part, upon the failure of the plaintiff to perform or make good any promise, representation or warranty, not contained in such policy, but set forth in any other paper or instrument in the hands of said insurer, the notice under the general issue shall declare the same and indicate the breach relied on. *Adopted October 28, 1869.*

[The court expressed their disapproval of the practice of transmitting the files of the court from one office to the other, and directed the clerk not to send them without a special order of the court.]

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ERRATA.—On page 330, fourteenth line, for the word "and," read *And*.

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JANUARY TERM, 1869, AT LANSING.

Truman W. Spencer v. Wallace Towles.

Agency: Money had and received: Agreement: Minor's bounty. Where, by arrangement with a father and his minor son, a third person undertook to obtain, without charge, the highest enlistment bounty attainable, and pay it over to the father, and did actually receive a bounty and paid over a part under pretence that it was the whole, having received no new instructions from any one, he was held liable to an action for the balance by the father, for money had and received.

His conduct in obtaining the money made him an agent, whether he could have been compelled to assume the agency or not, and he was then bound to carry out his original instructions, unless waived or countermanded.

The action for money had and received does not depend upon any preliminary agreement, but upon the receipt of money, by one, that he is bound to pay over to another.

Heard January 9th. Decided January 11th.

Error to Ingham Circuit.

This was an action to recover certain money collected by defendant for plaintiff on account of bounty money received by the former, for the enlistment of the latter's son in the army.

Judgment was rendered in favor of defendant below.

The facts are stated in the opinion.

Dart & Wiley, for plaintiff in error.

Crane & Montgomery and *H. A. Shaw,* for defendant in error

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CAMPBELL J.

Plaintiff sued defendant for money had and received under the following circumstances, as found by the court below.

On September 2, 1864, plaintiff gave his written consent that his son, Truman A. Spencer, who was under eighteen years, might enlist into the military service of the United States, and on the following day the son did enlist and was duly enrolled and sworn. After plaintiff had given his consent to his son's enlistment, it was agreed between the parties that the defendant should not charge for commissions, and as the boy was young, the plaintiff requested defendant to obtain the highest bounty he could for the son, and the defendant agreed to do so, and that as he was going to return the following day he would bring the bounty to the plaintiff. On September 3, defendant secured as the bounty of Truman A. Spencer (he being credited to the quota of the township of Dansville, or Ingham) the sum of $450, and on the following day paid the son five dollars of the same, and brought and paid to plaintiff $320, as the bounty for the son's enlistment. This action is brought to recover the remaining $125. The court below found as a fact that the consent of plaintiff to let his son enlist was not upon the consideration that defendant would procure and pay over the bounty. The conclusions of law on these facts were that no recovery could be had under the special count; that the bounty belonged to the son alone, and that plaintiff could not recover at all.

We think the facts entitle plaintiff to a judgment. It is found that the agreement that defendant should obtain the bounty and pay it over to the plaintiff was by the joint consent of all parties. It was not, so far as appears, an agreement which would have been valid in law to compel him to undertake the agency, had he seen fit to decline.

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The action for money had and received does not depend upon any preliminary agreement, but upon the receipt of money by one that he is bound to pay to another. When he acted upon this original understanding, defendant assumed an agency; and when he received the money he was bound to pay it over, as he had been originally instructed, unless relieved from that liability by new instructions from some one authorized to make the change in the arrangement. He was, therefore, bound to pay the money to the father unless he was otherwise directed. It makes no difference whether the father was to receive the money for himself or as trustee for his son. Had the son countermanded the order it would then have become necessary to ascertain whether he or his father really owned the fund. But no such action was attempted. A part of the money was paid to the son, and the correctness of this payment is not disputed. A part of the remainder was paid to the father as the bounty received. Instead of acting in the son's behalf in refusing to pay over the money, defendant pretended that he was paying all, when he was fraudulently withholding a part. The son, if he owned the money, had preferred his father's trusteeship to that of defendant; and it would not be desirable to encourage such volunteer guardianship over the interests of minors as the defendant has here assumed.

There is no room for any favorable construction of his conduct. He misrepresented the amount of the bounty, and his chances of concealment could only have arisen from the failure of the young soldier to come back again. It would be ridiculous to entertain the idea that this action was meant for the son's benefit; and it does not purport to have been done by his authority.

Judgment below must be reversed, and judgment rendered on the finding for $163.12, and costs of both courts.

The other justices concurred.

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Tunis Ryerson and Another v. Samuel D. Eldred and Others.

Assignment of property by reference to schedule. Where debtors make an assignment to a trustee for their creditors, of their property as described in a schedule attached, only such property passes as is there described.

Assignment treated as void by the parties: Rights of a purchaser from the assignee. Where an assignment, ostensibly for the benefit of creditors, was treated as void by all the parties thereto, and A., one of the assignors, entered into a contract with the others, with the knowledge of the assignee, that they should convey a certain piece of the joint property to him, and that in consideration thereof, A. should pay the joint debts, and also make certain payments to the other assignors, and under that contract he went on and made large payments to creditors, and improved the property: *Held*, that B. and C., who were not creditors, and who, with knowledge of this contract, bought the property described therein from the assignee and from such other assignors, were bound by the contract, and might be compelled to carry it into effect by deeding over to A. the rights acquired by their purchase.

Accounting in such case. A. in such case should account to B. and C. for such moneys paid by them on their purchase as had been actually applied on the joint debts which A. by his contract was to pay, and B. and C. should account to A. for the rents and profits of the land for the time they had occupied it under their purchase.

Landlord and tenant: Purchase by tenant of adverse claim. One who is in possession of land as tenant of another, cannot buy in an adverse title which existed at the time he received his lease, and make such purchase the basis of a suit in equity to quiet his title as against his landlord. The possession acquired by means of the lease must be surrendered before the tenant is in position to dispute the title under which he entered.

Persons not parties to suit, not concluded by an accounting. When an accounting is had in a suit in equity, persons incidentally interested therein, but who are not parties to the suit, are not concluded thereby.

Heard October 20th and 21st, 1868. Decided January 11th.

Appeal in Chancery from Muskegon Circuit.

The bill in this cause was filed by complainants to restrain Samuel D. Eldred, one of the defendants, from proceeding under the Forcible Entry and Detainer act to remove them from certain premises, and to compel him to release his claim of title to the same.

Eldred filed his cross-bill, setting up his title to the same. Proofs were taken in both cases, and the cases were heard together. The Court made a decree granting the relief prayed by the bill, and dismissed the cross-bill.

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L. Patterson, and *Moore & Griffin*, for complainants in original bill.

Edwin Potter, *John T. Holmes*, and *G. V. N. Lothrop*, for complainants in cross bill.

CHRISTIANCY J.

Samuel D. Eldred, of Muskegon, Michigan (one of the defendants in the original, and complainant in the cross bill), together with Orson P. Eldred, Nelson Eldred, and Joseph H. Way, of Illinois, having been engaged in the business of selling lumber at Chebanse and Prospect City, Illinois, under the style of J. H. Way & Co., and at Kankakee, Illinois, under the style of N. Eldred & Co., were also engaged, from 1856 to 1859, at Muskegon Lake, in Michigan, in the manufacture of lumber, under the style of Eldred, Way & Co., and being somewhat embarrassed with debts, on the 15th of July, 1859, seem to have undertaken to make a real or pretended assignment to Frederick S. Eldred, of Janesville, Wisconsin; and on that day executed to him an instrument purporting to assign and transfer to him (not all their property generally, but) all their property mentioned in the schedule of property attached, for the benefit (not of all their creditors generally, but) of all their creditors mentioned in the schedule of debts attached, which included debts to the amount of about $9,000. Whether the property described or attempted to be described in the schedule included all their partnership property, does not distinctly appear by the evidence, though it does appear that it did not include all the individual property of the several assignors, nor does it appear that the debts mentioned in the schedule were all the debts owed by the said firms, though the evidence authorizes an inference that the whole amount of debts was not included in the schedule.

The property assigned consisted of lumber and other personal property, notes, accounts, &c., of real estate, situate

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in Iowa, Illinois, and Michigan, and possibly intended to include, among others in the latter State, some five acres at Muskegon Lake, with a steam saw mill and other buildings thereon, known as the mill property, and which is the subject of controversy in these cases. The only description in the schedule which could possibly apply to this was "five acres of land in Muskegon County, State of Michigan, more particularly described in deed of Eben Smith, Jr., to Nelson Eldred and others, and recorded in Liber M. of Deeds, on page 455, in Ottawa County, valued at $15,000." The original bill alleges that this mill property was conveyed by Samuel Wood and wife to Samuel D. Eldred, and a mortgage given back for the purchase money, and this is admitted by the answer of S. D. Eldred; and there is nothing in the pleadings or proofs to show that it was ever owned or conveyed by Smith; and, so far as appears, Samuel D. Eldred never conveyed it, unless the assignment operated as a conveyance. The least, therefore, that can be said, is that the correctness of the description of this mill property does not appear; and there is at least an inference that the description, by reference to the Smith deed, is incorrect, or that the deed conveyed some other property. It does not, therefore, appear (admitting the assignment to be in all other respects valid) that this property was conveyed to the assignee.

The description of the lands in Illinois is simply "Fourteen and a half lots of land in Kankakee City, Kankakee County, Illinois, valued at $5,400," and "Two-sevenths of 1,600 acres of land in Green County, Illinois, at $2,500." That in Iowa is described merely as "One hundred and twenty acres of land in Chickasaw County, Iowa, valued at $600."

These descriptions of land, in Illinois and Iowa, are too uncertain and vague to make the assignment operate as a transfer of title (had it been in all other respects well executed), at least, without clear evidence that the assignors

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owned certain lands in the city, or counties named, which might fall within the description used, and that *these* were the only lands owned by them in such city or county.

There are other defects in the assignment. In form it is drawn in *tripartite*, as if to be executed by the assignors, of the first part, the assignee, of the second part, and the creditors, of the third part. The instrument itself is signed only by the assignors. No creditor signs it, nor does it appear that it was ever known to the creditors. It contains an express covenant on the part of the assignee to perform the trust. He does not, however, execute the instrument, but signs an instrument purporting to accept the trust, and appointing Nelson Eldred, of Kankakee, Illinois, and Samuel D. Eldred, of Muskegon, his agents, with full power to perform all acts in relation to the trusts which he might perform if present. The only acknowledgment of the instrument, is in the following words: "Acknowledged by Samuel D. Eldred, this 5th day of December, A. D. 1859, before me, Theodore Davis, Justice of the Peace."

This was not a sufficient acknowledgment, even as to Samuel D. Eldred, to authorize the instrument to be recorded. It seems however to have been put upon record by Samuel D. Eldred. The assignment expressly authorized the assignee to sell on credit, and was therefore fraudulent and void as against creditors, at their option, — (*Sutton v. Hanford, 11 Mich. 513*)—though they might doubtless have waived this by claiming under the assignment, which it does not appear they ever did.

The assignee does not appear to have taken any charge or control, in fact, of any of the assigned property. He resided at Janesville, Wisconsin; and it does not appear he ever saw any of the assigned property or gave any instructions in reference to its sale or management. No change whatever in relation to the actual control and management of the property seems to have taken place in consequence

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of the assignment, except in such matters of mere form as will presently be noticed. It is hardly probable from the assignment itself, and the evidence in reference to it, that the assignment was at the time of its execution considered of any actual validity by any of the parties. If so, they seem very soon after to have treated and considered it of no validity, and continued so to treat it, until the attempted sale to Ryerson and Johnson hereafter to be noticed. It would seem to have been executed only as a kind of blind to ward off creditors, in case they (the firm) could not otherwise avoid a sacrifice of their property, for there appears to have been at all times an honest intention and a real anxiety on the part of all the assignors to pay the creditors as fast as practicable, from the proceeds and the use of the property.

Samuel D., who resided at Muskegon, appears to have had entire control of the mill property; and immediately after the assignment, for the purpose already indicated, and to preserve an appearance of consistency, he seems to have commenced keeping his accounts, and doing other business, and executing papers in the name of Frederick S. Eldred, by himself as Agent; and this course seems to have been continued as to much, if not most, of the business, after his contract of purchase presently to be noticed, and until August, 1862, when he went into the army.

But on April 1, 1860, the assignors all appearing to regard the assignment as invalid, entered into a contract under seal, by which all the other assignors agree to sell to Samuel D. Eldred, all the property and assets of the several firms (including of course the mill property), in consideration of which said Samuel D. by the same contract agreed, among other things, to pay all the debts of the said several firms; and when his contract should be complied with, the other parties were to convey to him all the real estate by good warranty deed. The assignee, Frederick S. Eldred, was informed of this contract and made no objection whatever, but silently acquiesced.

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Under this agreement, Samuel D. Eldred proceeded to dispose of portions of the property and to pay debts; and in making the sale of some 500 acres of pine land (which seems to have stood in the name of all the partners), all the assignors joined in a warranty deed to the purchaser, who, however, for greater security, required that a quit claim deed should be obtained from Frederick S. Eldred, the assignee. This was prepared by Samuel D., and forwarded to the assignee, who at once executed and returned it to him in a letter in which he says "yours with deed is at hand. I have executed the same and ret. The expense is one dollar. Rufus has given me a note against your Company for $380, which he wants the money on very much, as he is about buying a farm in Iowa. Please let me know what you can do about it." It is thus quite clear that the assignee did not look upon this sale in any respect as his, and expected to have Samuel D. refund the expense. He says nothing, and claims nothing of the proceeds of the sale.

Samuel D. continued to dispose of property and to pay debts; and from the use of the mill, the sale of property and otherwise, had, prior to his leaving in August, paid a large amount of the debts, between $5,000 and $6,000 at least, — (the whole amount for which the assignment had been made appeared to have been but about $9,000) — and in addition to this amount of debts paid, had also, up to the time last mentioned, expended in improvements upon the mill and mill property and taxes, over two thousand dollars; the precise sum we do not here attempt to fix.

After the agreement of sale to Samuel D., of April 1, 1860, Nelson Eldred became his agent for the management and disposition of the property in Illinois, fully recognizing him as the owner, and neither of the other assignors disputing his rights.

But in August, 1862, Samuel D. Eldred enlisted in the Union army for three years, and was much of the time stationed in Arkansas. Some time prior to this the mill had

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been let to, and was then being run by one Steeley, for the season: the letting being probably in form, in the name of Frederick S. Eldred, by Samuel D. Eldred. When he went into the army he left his wife in the house on the mill property and in charge of it, and left Ryerson (one of complainants in original bill) as his agent to take charge of the business connected with the mill for that sawing season.

On March 11, 1863, Ryerson and Johnson (complainants in original bill) took a written lease of the entire mill property from Samuel D. Eldred for one year from January 1, 1863, the lease being dated back to that day. This is a full and formal lease by indenture under seal in the name of Samuel D. Eldred as lessor of the first part, and the lessees of the second part, executed on the part of the lessor by his wife, as his agent, who was duly authorized for that purpose. The rent to be paid was seven hundred dollars, a part of which was to be paid directly in satisfaction of a decree of foreclosure for one of the debts which Samuel D. Eldred, by his contract of purchase, was to pay. The lease contains a covenant on the part of the lessees against assigning or underletting without the written assent of the lessor, and a covenant to surrender and yield up to the lessor, the premises in good repair at the end of the term.

There is no evidence tending to show that there was any mistake on the part of the lessees in taking this lease from Samuel D. Eldred in his own name, or that they supposed or believed it to be in the name of the assignee, by Samuel D. Eldred as agent; but it appears to have been knowingly and deliberately taken as a lease from Samuel D. Eldred, as lessor. Under this lease they went into possession. But during the term created by it, and while in possession under it, in the summer and fall of 1863, Ryerson & Johnson, the tenants, entered into negotiations with the other assignors (Nelson and O. P. Eldred and Way) for the purchase of the mill property; at first, with the expectation

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on all hands that the deeds were to be executed by all the assignors, including Samuel D. Eldred. The other assignors had been urging Samuel D. to sell, in order to pay up the debts, while he, on the other hand, appears to have been unwilling to sell the whole of the mill property, at least upon the terms they proposed. And, though an attempt was made to show, by Nelson Eldred, that Samuel D. had consented he should sell as he deemed best, this entirely failed; as it was an attempt to show the contents of letters, not shown to have been lost or searched for. We, however, think it entirely clear that the other assignors, as well as Ryerson and Johnson, up to the time when Samuel D. refused to execute the deed which had been prepared and forwarded by Nelson Eldred to him for that purpose, all expected Samuel D. to join in the sale, and that it was not till they found he refused to do this, that any of them had thought of ignoring his rights in the property, or of treating the purchase of Ryerson and Johnson as a purchase from the assignee, which should cut off all the rights of Samuel D. We are also satisfied that before the purchase was completed (and we are inclined to think even before Samuel D. Eldred went into the army) Ryerson had notice of and understood the contract of purchase made by Samuel D. of April 1, 1860, and that he had been making payment in pursuance of that agreement.

But, finding that Samuel D. would not consent to the sale, the other assignors informed Ryerson that they could convey their shares, though they could not convey that of Samuel D., to which Ryerson replied he "would fight Samuel D. Eldred's share;" whereupon, on the 29th October, 1863, O. P. Eldred, Nelson Eldred, and Joseph H. Way, with their wives, executed to Ryerson and Johnson a warranty deed, purporting, for the consideration of $5,625, to convey the undivided three-fourths of said mill property and five acres, which deed appears to have been acknowledged on the 7th November, 1863, and on the 20th of the same

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month a quit-claim was obtained from the assignee. Four thousand dollars of the purchase money was paid down, fifty of which was retained by Nelson Eldred, as he says, for his services in the matter, and the balance sent to the assignee, some part of which he subsequently used in paying a foreclosure decree, on which the mill property would otherwise have been sold.

The original bill states the whole purchase price to be paid by Ryerson and Johnson at eight thousand dollars, one-half of which is alleged to have been paid down, and the balance ($4,000) secured by a mortgage upon the property, payable in one year. But there is no evidence what the whole purchase price was to be, nor of any mortgage for any part of it. The $4,000 is all that is proved by the evidence, and there is no admission touching this matter in S. D. Eldred's answer or cross-bill.

The lease to Ryerson and Johnson having expired on the first day of January, 1864, and they refusing to give up the possession, Samuel D. Eldred, the lessor, through his agent, Ruddiman, commenced proceedings under chapter 150 Compiled Laws, for the recovery of the possession; whereupon Ryerson and Johnson filed the original bill to restrain these proceedings, and to compel a release from Samuel D. Eldred of all claim to the premises; to which he put in an answer, denying the validity of the assignment, or that it was ever understood or intended to be valid, setting up his contract of purchase and the lease, charging complainants with notice, &c., and filed his cross bill, asking that Ryerson and Johnson be decreed to release and convey to him; he declaring his readiness to pay the balance of the debts, as required by his contract.

There are many other matters appearing on the record; but the above are all we deem material to the rights of the parties, and which are at the same time satisfactorily proved.

From this statement we think it results: First, that even admitting the validity of the assignment in all other

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respects, as between the parties to it, the complainants in the original bill have failed to show that they acquired any title by the assignee's deed, or that the mill property passed by the assignment to the assignee, for the reasons already stated, that it does not appear that the mill property was described in the schedule; and this could only be made to appear by showing that there was such a deed as the Smith deed referred to by the schedule, and that it contained a description of the mill property. The burden of proving this rested upon the complainants, claiming title through the assignee. And though this point is not expressly raised by the answer of S. D. Eldred, we can find nothing in his answer, when fairly construed, which can properly be taken as an admission of the correctness of this description; especially when it is construed with reference to the original bill itself, which would seem to give a different derivation of title from that indicated by the reference in the schedule.

Second. That, as to the deed from the other assignors, of the three-fourths of the mill property, the complainants have also failed to sustain their bill, for the reason (among others) that, even supposing the legal title to have been vested in the firm, (composed of all the assignors) — which does not appear — the complainants purchased with notice of the contract of April 1, 1860, by which the other assignors agreed to sell the property to Samuel D. Eldred, and with notice that he had been making payments in pursuance of that agreement.

This agreement was clear from all taint of fraud, and appears to have been made in entire good faith, and for the purpose of paying off *all* the debts of the several firms of which the parties were members — a purpose which Samuel D. Eldred appears to have pursued with fidelity, and considerable success. And we are inclined to think, though we do not here decide — that even if the assignment had been valid as between the parties, and, (as between them) conveyed this property to the assignee, yet being fraudulent

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as against creditors, and the creditors never having claimed under the assignment, this agreement of April 1, 1860, known to, and acquiesced in, by the assignee, must, at least after the large payments made under it, as to all the parties to these suits, be treated as entirely valid; and that its validity could be disputed, if at all, only by creditors actually claiming under the assignment.

But third; there is another insuperable objection to sustaining the original bill of the complainants, whatever view may be taken of the assignment or the agreement of April 1, 1860. The title which they undertake to set up against Samuel D. Eldred under the assignment, if it amounts to any thing, was in its nature *adverse* to his, and must have existed, if at all, *prior to*, and *at the time* of the *lease* from Samuel D. Eldred to them. To set up this title against him is to deny his title as landlord at the time they took the lease. This lease was by indenture, under seal, and by means of this they obtained and enjoyed the possession undisturbed for the term, and by it they covenanted to restore to him the possession at the expiration of the term. They cannot, therefore, at least until they have restored the possession, be allowed to dispute his title as landlord at the time they took the lease, and to set up against him such adverse title — never asserted or claimed against them, but hunted up and acquired by them during the term, while in peaceable possession and enjoyment of the property under the lease. To permit this would be to open a wide door to frauds by tenants upon their landlords. If they could have set up at all against their lessor such a title thus obtained, they must first have restored the possession to him, so as to place him in *statu quo*, with all the advantages he would have possessed for contesting such adverse title, if the lease had never been made and he had never parted with the possession.— *Falkner v. Beers, 2 Doug. (Mich.) 117; Hodges v. Shields, 18 B. Mon. 828, 832;*

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Williams v. Garrison, 29 Geo. 503; Porter v. Mayfield, 21 Penn. St. 264; Thompson v. Clark, 7 Id. 62; Brown v. Keller, 32 Ill. 151–155; and see Miller v. Shackleford, 4 Dana, 286; 4 Bac. Abr. Lease, O., 189–197; Great Falls Co. v. Worster, 15 N. H. 412, 450.

It remains only to consider what, if any relief, Samuel D. Eldred is entitled to, under his cross-bill.

We think, upon the case made by the pleadings and proofs, he is entitled to a decree declaring the deed of the other assignors and of the assignee to Ryerson and Johnson utterly void and of no effect as against him; and that he is entitled to be placed in the same position, as nearly as practicable, that he would have occupied had no such deeds been executed, and the premises been surrendered to him at the expiration of the lease.

That he is entitled to a fair compensation for the use of the mill property—that is to say, what the use of the property would have been worth to a prudent man with proper use after keeping it in reasonable repair, and paying such taxes as may have been paid by them—from the expiration of the lease up to the time possession shall be delivered or tendered to him, and that Ryerson and Johnson should be decreed to deliver the possession to him within thirty days after service upon them of a certified copy of this order.

And on the other hand Ryerson and Johnson must be allowed or repaid so much of the amount paid by them as purchase money to the other assignors and the assignee, as they (Ryerson and Johnson) shall be able to show has been actually applied and paid upon the indebtedness of the said several firms which Samuel D. Eldred, by his contract of purchase was to pay.

Proofs and an account must be taken in the court below (or by reference from that court) of the amount on the one side to be allowed to Samuel D. Eldred for such use of said property, and on the other of the amount of

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debts of the said several firms paid from the purchase money as aforesaid. And this latter amount, when ascertained, or so much of it as may be required, must be applied in offset or liquidation of the amount found due to Samuel D. Eldred for such use of the premises. And if there should be any balance still due said Samuel D. for such use of the premises, then such balance must be paid to him by said Ryerson and Johnson. But if a balance shall be found due to the latter, it shall constitute a lien upon the interest which said Samuel D. acquired in this land by said contract, till paid; and said Samuel D. must be decreed to pay the same to said Ryerson and Johnson within three months after the date of the final decree therefor; and in default of such payment they to be at liberty to enforce such lien.

The other members of the firm, Nelson Eldred, Orson P. Eldred, and Joseph H. Way, being interested in the payment of the partnership debts, and in the full performance by Samuel D. Eldred of his part of the contract of purchase of April, 1, 1860, and they not being parties in either of these causes, no account can properly be taken of the payments made upon such partnership debts by Samuel D. nor can the question of full performance by him of his contract be determined, so as to bind them. But these are questions in which Ryerson and Johnson are not interested.

The decree of the Circuit Court must be reversed with costs, the original bill dismissed, and a decree of this court must be entered in accordance with the opinion above expressed. And the record must be remitted to the court below for such further proceedings as may be necessary to carry such decree into effect.

The other Justices concurred.

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William Davis v. William J. Walker.

Interest upon unsettled demands. Where parties account together concerning their mutual demands, and find that one owes the other a certain sum, but it appears that considerable items which are counter claims are not brought into the account, such accounting is not such a final accounting as will authorize interest to be charged on the sum so found to be owing.

Heard January 8th. Decided January 11th.

Error to Clinton Circuit.

This was an action of assumpsit brought on book account in a Justice's Court.

The case was appealed to the Circuit Court, where the matter in issue was referred to a referee, who found for the plaintiff below; allowing him interest on certain items of account.

The report was excepted to by defendant. Some of the exceptions were sustained, and judgment was rendered in favor of plaintiff for a reduced amount.

The only question involved is as to the allowance of interest.

Spaulding & Cranson, for plaintiff in error.

The plaintiff's account having been rendered and assented to by the defendant, a time was fixed from which he admitted that he was indebted and ought to pay. Having neglected payment, the plaintiff is entitled to interest as a penalty or damages for non-payment.—*7 Wend. 113, 446; 2 N. Y. 135; 11 N. Y. 102; 3 Caines 234; 12 Johns. 156; 15 Id. 424; 3 Cow. 400; 4 Id. 496.*

If the defendant has a counter claim, he may tender it in payment and stop interest to that extent; in other words, he may use it as so much money in payment of his indebtedness.

But if wrong in this position, plaintiff is certainly entitled to interest on $79.45, (the judgment rendered by the

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court), from commencement of suit, which is a legal demand.—*3 Cow. 434; 11 Wend. 486; 11 N. Y. 102; 12 N. H. 474; 4 E. D. Smith, 18.*

Walbridge & Selden, for defendant in error.

Interest may be allowed upon a demand in favor of A. against B. when the amount can be computed or ascertained by reference to well known market values; and very properly. Such a rule is clearly based upon the principle that B. is presumed to know the amount of his indebtedness, and, therefore, has no legal excuse for witholding payment. *20 N. Y. 463.*

The accounts of the parties were never liquidated. A balance in favor of either party was never determined, until the referee determined the same upon the legal proof.

Their said partial accounting was no liquidation of their accounts. It failed to determine the balance between them. *3 Cow. 393.*

When parties have mutual dealings, as in this case, and when a balance may be shifting in favor of one party to the other, and varying in amount from day to day, the Courts have never allowed interest, unless upon an express contract to that effect, and until their demands have been liquidated and a balance determined, or unless for cash advances. *24 Ill. 133; 3 Cow. 393; 2 Wend. 501; 17 Barb. 456; 4 Id. 36; 20 N. Y. 463; 8 Vt. 258; 1 Johns. 315; 6 Id. 45; 15 Id. 425; 8 Vt. 258; 3 Mich. 560.*

COOLEY C. J.:

The only question in this case relates to a small item of interest claimed to be due the plaintiff from the defendant, and which the Circuit Judge disallowed.

It appears that prior to November, 1865, there had been a running account between the parties, and that on the 24th or 25th of that month they accounted together as to most

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of the items thereof, and found due to the plaintiff $216.50. But items due defendant, amounting to $83.05, were not considered at that time, and further accounts accrued in favor of both parties up to September, 1866. The interest is claimed on the amount due plaintiff at the time of the accounting in September, 1865.

It is clear, we think, that this accounting was in no sense a final one, and that therefore no balance can be considered as struck upon which interest would run in the absence of any special agreement to that effect. The account was still an open and mutual account, notwithstanding the major part of the items were agreed upon; and the Circuit Judge was therefore correct in denying interest.

The judgment must be affirmed with costs.

The other Justices concurred.

Daniel J. Campau v. Joseph Godfrey et al.

Execution-sale of interest of one tenant in common of lands. Whether, where the interest of one tenant in common in a part only of the lands held in common is sold on execution, the sale can be declared void, except on behalf of his co-tenants, and on its being made to appear that it would injuriously affect their interests, *quære.*

One who should subsequently receive from such tenant in common a deed of the lands so sold on execution, could not maintain a bill to have the execution sale set aside, on the ground of such an interest in a part of the lands not being salable; because, *First*, if the execution sale was good, it must stand; and, *Second*, if it was bad, so upon the same grounds would the grant to himself be; and therefore in either contingency he must fail.

Excessive levy upon lands, remedy for. One who complains of an excessive levy upon his lands, should move for relief in the court which issued the execution, instead of proceeding by bill in equity.

Where the statute gives the execution debtor a year in which to redeem, after a sale of lands has been made on execution, and he neglects to exercise the right, the sale will not afterwards be set aside on his application, on the ground that the levy was excessive.

Redemption in equity after statutory time has elapsed: Negligence. A party who, through gross negligence or ignorance of the law, fails to redeem lands sold on execution within the time limited by statute, has no claim to relief in equity.

Heard October 15th and 16th. Decided January 11th.

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CAMPAU v. GODFREY ET AL.

Appeal in Chancery, from Wayne Circuit.

The bill in this case was filed to set aside a sheriff's deed of certain real estate executed to two of defendants as void, and as constituting a cloud upon complainants title.

Godfrey, Dean & Brow having a small demand against Theodore J. Campau, put it in judgment and caused execution to be levied on his undivided one-ninth interest in certain lots in Detroit, which constituted a part of the lands belonging to the heirs of Joseph Campau, of whom he was one. This interest was sold to the plaintiffs in execution, who afterwards assigned their certificate of purchase; and their title under it was acquired by Frederick E. Driggs and Milton H. Butler. T. J. Campau suffered the time for redemption to expire without redeeming. Meanwhile the heirs of Joseph Campau, excepting the children of James J. Campau who owned an undivided one-ninth, went on and made voluntary partition among themselves of all the lands belonging to the estate, and set off to Daniel J. Campau the lots in which Theodore's interest had thus been sold on execution. Daniel J. Campau then filed his bill in equity to have the execution-sale declared void on the grounds:

1. That one tenant in common can not sell his interest in the part of the property owned in common, because of the injurious effect it might have upon the interests of his co-tenants in preventing such a partition as they might otherwise have obtained. And this being so, the same reasons would preclude an execution-sale of the interest of one in a part of the lands.

2. That the levy and sale in this case were excessive.

3. That T. J. Campau was induced not to redeem from the execution-sale by negotiations which were taking place between him and the plaintiff's attorney concerning it.

The case was heard on pleadings and proofs, and the prayer of the bill was granted.

Walker & Kent, and *T. Romeyn*, for complainants.

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1. The sale under said execution was void as against complainant and the other heirs of said Joseph Campau, deceased, because it was an attempt to sell the interest of Theodore, who was one of several tenants in common in a specific and undivided portion of the estate owned in common.

One tenant in common can not convey his interest in a specific parcel of the land held in common; and such conveyance is void, or at least voidable by the co-tenants, though some of the cases hold that it is good against the party conveying.—*4 Conn. 395; 5 Id. 363; 3 Ga. 492; 24 Me. 482; 12 Id. 198; 14 Grat. 82; 11 Grat. 340; 2 Robinson, 273; 3 Stockton, N. J. 548; 10 N. H. 246; 15 Id. 449; 37 Id. 134; 44 Id. 413; 38 Id. 127; 12 Id. 563; 9 Mass. 34; 12 Id. 348; 12 Id. 474; 13 Id. 56; 24 Pick. 329; 22 Id. 316; 1 Washb. Real Estate, 417 and note; 2 Kent's Com. 368; 2 Greenlf. Cruise, 410 and note.*

The only authorities to the contrary that we have been able to find are.—*2 Ohio, 110; 6 Ohio Cond. p. 468, 161; 2 Harris and Johnson, 421.*

In the following cases it is held that the principle above stated in regard to a sale by one tenant in common applies with the same force to a levy upon the interest of one tenant in common in a specified portion of the estate. Indeed none of the authorities make any distinction between the case of a levy and a voluntary conveyance.—*3 Vt. 399; 9 Id. 138; 2 Id. 244; 2 Id. 243; 28 Id. 183; 18 Me. 229; 21 Pick. 283.*

It will be attempted to distinguish the case at bar from the most of those cited, because in them the attempt was to convey a specific portion of an entire tract held in common, and in this case the levy was upon several of a large number of parcels. No such distinction is found in the books, and there is no foundation in principle for it.

But three of the cases cited were cases of conveyance by one tenant in common of his interest in one or more of

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several parcels held in common, and in this respect correspond with the case at bar. — *12 N. H. 563; 24 Pick. 329; 2 Harris and Johns. 421.*

2. The levy in question was void because excessive. Property worth, estimating only a one-ninth interest, from $8.000 to 10.000 was sold for less than $200. If any case can justify the setting aside of a levy on account of its excessive character, this is one.

3. If said execution-sale and the deed thereunder, conveyed any interest to defendants, Driggs and Butler, we ask the aid of this court to enable us to redeem on such terms as shall be equitable.

Theodore Campau, whose duty it was, intended to redeem, and was kept therefrom by mistake and a natural reliance on the honest assurances of the attorney who recovered the judgment, and who was supposed by both to control the redemption. Complainant was guilty of no negligence in relying upon Theodore's promise, and it would be very hard if he must suffer so largely from the negligence of another. There is no doubt of the power of a court of equity to allow the redemption we ask; and certainly such a redemption would be but equitable. — *1 Johns. Ch. 502; 6 B. Mon. 384; 4 N. Y. 554; 33 Ala. 494.*

John J. Speed, and *D. C. Holbrook,* for defendants.

1. Where one complains of an excessive levy on his lands, his duty is to apply for relief to the court from whence the execution issued. — *Walk. Ch. 344; 23 Ill. 503; 2 Ind. 99.*

The complainant claims that the estate of Joseph Campau was inherited by his heirs as an entirety, and subject to a partition; that the interest of Theodore J. Campau in separate parcels of the property could not be levied upon, sold and conveyed, prior to such partition; that the sheriff's deed to these appellants may be avoided by complainant, to whom

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Theodore released his interest subsequent to the sale under the execution; and that these appellants may be required to convey to him any interest that they may have acquired under the sheriff's deed.

Had the estate consisted of a single parcel, the conveyance by the sheriff of any specific portion thereof, or of Theodore's interest in any specific portion described by metes and bounds, might have been avoided by the other heirs.—*1 Hill. Real Prop. 593, 596; 9 Mass. 34; 12 Id. 349.* But the present case is a different one.

Our statute recognizes no distinction as to the number and connection of their owners between estates inherited and those acquired by purchase.—*2 Comp. L. 2627.*

All real property of the debtor, except expressly exempted, is subject to sale on execution.—*2 Comp. L. § 3119; 17 Mass. 81; 2 Conn. 244; 2 Har. & Johns. 42; 1 Id. 100.*

Separate parcels shall be exposed for sale, and the debtor may redeem such parcel, or his undivided interest therein. *2 Comp. L. §§ 3121, 3127, 3134; See also L. 1867, 97, 133.*

It does not follow necessarily that a fair division of the estate can not now be made in consequence of the sale, even if it be held that the heirs took the property subject to a division. The lots are as valuable as ever for the purpose of occupancy or sale. In partitioning the estate, these lots might be set off to Theodore Campau and an equal amount in value allotted to the other heirs. If partition can not otherwise be made, these lots may be sold and the proceeds divided. The other heirs must receive their fair share, but no more; but if they receive it in value they can not complain. Any division made must be based upon the value of each parcel.

We thus see that a levy upon, and sale of specific portions of a tract might operate so as to prejudice the cotenants by lessening the value of the entire tract; but a levy upon the entire parcel does not affect its value nor prevent the other heirs from receiving the same in value

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that they otherwise would have received. The most that can be said is that this levy introduces another interest to be protected.

CHRISTIANCY J.

The bill in this case was filed to remove a cloud from the complainant's title to an undivided ninth of lots 93 and 94 in section one, and lot 67 in section two, of Governor and Judges' plat of the city of Detroit. Complainant claims title to this one-ninth as the grantee of his brother, Theodore J. Campau, one of the heirs of Joseph Campau, deceased: complainant owning another ninth as such heir.

Joseph Campau, the ancestor, died intestate July 23, 1863, seized of this and a large amount of other real estate, situate mostly in Wayne county, but a large amount of it in many other counties in this State — the whole amounting in value to some two millions of dollars.

After the levy and sale presently to be noticed, but before the time of redemption had expired, all the heirs of Joseph Campau, except the children of James J. Campau, deceased (one of the heirs of Joseph), owning the one-ninth, joined in the attempt to make an amicable partition among themselves of all the real estate of their ancestor, Joseph Campau; wholly ignoring the children of said James J. and their interest; and for the purpose of effecting this partition, mutually executed and delivered deeds purporting to release and convey to each other in fee and in severalty, entire parcels of said estate and specific blocks and lots by number and description; thus purporting to divide up the whole estate in the same manner as if they had owned the whole, instead of the eight-ninths only.

The lots here in question were thus released and purported to be conveyed in fee and in severalty to the complainant, by the other heirs (including said Theodore), who owned the seven-ninths: the heirs of James J. owning the one-ninth, not joining or being recognized in any way.

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Under this conveyance complainant claims to have acquired from said Theodore the one undivided ninth of these lots, which is all that is in controversy in this case.

Such is the title of complainant.

Defendants Driggs and Butler, claim title under levy and sale upon an execution against said Theodore, made to Godfrey, Dean and Brow, sometime prior to the partition deeds already mentioned, but the time of redemption upon which had not expired when such partition deeds were executed, though the sheriff's certificate of sale was on file in the office of the Register of Deeds. The sale on the execution was of the interest of said Theodore in the lots here in question and in two other lots subsequently conveyed by the partition deeds to other heirs. The interest of Theodore in each of these lots was sold separately for thirty-seven dollars and fifty cents, making in all one hundred and eighty-seven dollars and fifty cents.

After the expiration of the year allowed to the defendant in execution to redeem, Godfrey, Dean and Brow sold their interest in the purchase, and assigned the certificate of sale to John J. Speed, who subsequently sold and assigned the certificate to defendants, Driggs and Butler, to whom the sheriff (after the fifteen months allowed to creditors to redeem) executed a sheriff's deed in due form.

Complainant claims that this sale on the execution constitutes a cloud upon his title, and that it is void upon two grounds. But the main ground upon which he relies is that the execution sale was of the interest of Theodore in only a part of the real estate owned at the time in common by him and the other heirs; there being a large amount of other real estate thus held in common by the same parties, Theodore's interest in which, was not levied upon or sold; and that the only way in which any interest of Theodore's could be sold on execution, or in which Theodore himself could have sold, was to sell an undivided interest

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in all the real estate thus held by the same tenancy; or at least, in all lying in the same county.

In support of this proposition complainant relies upon a considerable number of American authorities; no English decisions furnishing any direct support for the rule upon which the objection is based, and the little which is found in the English books tending, in some degree, to an opposite result; though the rule is supposed to result from common law reasons springing from the ownership of joint estates.

So far as the rule relied upon has been recognized, it is purely American, having originated in Massachusetts, in *Bartlet v. Harlow, 12 Mass. 348*, and *Varnum v. Abbot, Id. 474*, which have been followed, to a greater or less extent, in several of the states; some having extended, and others narrowed its application, and there being little uniformity in this respect.

In the great majority of the estates the question does not seem to have been decided; the cases being silent on the point. While Ohio seems to have expressly repudiated the whole doctrine in all its forms. See *White v. Sayre, 2 Hammond, 110; Prentis' case, Ohio Cond. R. (6 and 7 Hammond) 468; Treon's Lessee v. Emerick, 6 Ohio, 391.*

The question sought to be raised by this objection has never been decided in this court. And, as it is one of the first importance, the decision of which may seriously affect many titles, we propose to consider the general nature of the objection, with the reasons upon which it is based, as recognized by the authorities, without, in the first instance, expressing any decided opinion of our own until we see whether the question is properly involved in the case.

When the question arises with reference only to a single tract or parcel owned jointly or in common, the authorities are numerous and uniform that one tenant cannot, without the assent of his co-tenants, select a part of the tract by metes and bounds, and hold or sell it as his share in the

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tract; thus making a partition by his own act which shall bind his co-tenants—(see for examples, *Porter v. Hill, 9 Mass. 34; Holcomb v. Coryell, 11 N. J. 548; Staniford v. Fullerton, 18 Me. 229*).

The reasons for this are so obvious that they would probably be universally admitted. And for a similar reason, it seems to have been held by the courts of most of the states in which the question has arisen, that it is equally incompetent for such tenant, as against his co-tenants, to convey an undivided interest in a specific portion only, by metes and bounds, of a tract so held jointly or in common; and that, so far as the rights of the other co-tenants would, upon partition, be injured by giving effect to such deed, and compelling them to take their shares in several small portions, such deed would be treated as voidable at the option of such co-tenants.

The rule for which complainant contends seems to have originated in this class of cases, when but a single parcel was in question. And such, with two exceptions, are all the cases upon which he relies. And in some of the states (Connecticut and Maryland at least) the rule has been expressly held not to extend beyond a single parcel. *Starr v. Leavitt, 2 Conn. 243; Runicker v. Smith, 2 Harand J. 421.* But the reasons upon which the rule was first applied to the case of a single parcel were afterward in two cases only, so far as I have been able to discover (*Peabody v. Minot, 24 Pick. 329; Thompson v. Barber, 12 N. H. 563*), held to extend still further, and to apply as well to a sale of the tenant's undivided interest in one of several entire tracts when there were other tracts held by the same tenancy in which no interest was conveyed. And it is not to be denied that there may be cases of this kind to which the reason applicable in the case of a single tract, would apply with some, though generally a less, degree of force. Thus, there may be cases in which, if effect were given to the conveyance as against the other tenants, each of the latter might

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be compelled, on partition, to take his share in such minute portions of several different parcels, as greatly to reduce the value of his share; instead of receiving, as he otherwise might, larger portions, together, or certain whole tracts or lots. On the other hand, the lands held by the same tenancy may be so situated, or the amount of them so great, that in many cases the interest of the co-tenants would not be prejudiced, on partition, by giving full effect to such conveyance. And this might sometimes happen in the case of a single tract only, especially of a large one, or so situated as to admit of a perfectly fair partition into such parts as might be required to give effect to the deed. And whenever, upon a fair partition, that part of the property in which an interest had been conveyed, should be set off to the party selling or to his grantee, the other co-tenants receiving their full share in as advantageous a form as if the conveyance had not been made, the whole ground of objection to the conveyance would seem to fail. See *Varnum v. Abbot, 12 Mass. 474; McKee v. Barley, 11 Gratt. 340; Robinett v. Preston's heirs, 2 Rob. (Vig.) 273; Johnson v. Stevens, 7 Cush. 431; Holcomb v. Coryell, 11 N. J. 548.*

The only ground upon which such a conveyance can be held inoperative, is the injury it might do to the co-tenants, in partition, in the manner already stated. See *Varnum v. Abbot, supra.*

It has been sometimes suggested, and was urged upon the argument, that beyond the difficulties to be encountered in setting off the shares of the co-tenants so as to preserve their rights, there was a further objection to the validity of such deed, as it would create the necessity of several suits for partition, when one suit would otherwise have answered the purpose. It is possible (though I express no opinion upon the point) that the purchaser under such deed might not be allowed to sustain a bill for partition against the co-tenant. But if any of the co-tenants bring the bill, it may at least be doubted whether there is any difficulty in making

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the purchaser a defendant, (*Whitton v. Whitton, 38 N. H. 127; Story's Eq. Jur. § 656 a, 656 b, 656 c, and cases cited*), or whether the necessity of so doing (if it be necessary) can be recognized as a sufficient ground for holding the deed void, before it is, in fact, ascertained that a fair partition could not be made, giving effect to the deed. And if the co-tenants, in bringing a bill for partition, may ignore such conveyance, and make only the original tenant who has thus sold, a party; still, if the share of the tenant selling should happen to be so set off as to include that in which an interest had been sold, such partition would, according to most of the authorities in which the point has been discussed, enure to the benefit of his vendee by estoppel; since the deed would be good as to him and all claiming under him, if not as to all parties other than the co-tenants who might be injured by it. (And a sale on execution is held to stand on the same ground as a deed from the defendant in execution.) *Bartlet v. Harlow, 12 Mass. 348; Varnum v. Abbot, Id. 474; Porter v. Hill, 9 Id. 34; Baldwin v. Whiting, 13 Mass. 57; Cutting v. Rockwood. 2 Pick. 443; Nichols v. Smith, 22 Pick. 316; Cogswell v. Reed, 12 Me. 198; Cox v. McMullan, 14 Grat. 82; McKee v. Barley, 11 Id. 340; Holcomb v. Coryell, 3 Stock. N. J. 548; Great Falls Co. v. Worster, 15 N. H. 449; Whitton v. Whitton, 38 Id. 127; Smith v. Benson, 9 Vt. 138; Johnson v. Stevens, 7 Cush. 431; Challefoux et al. v. Ducharme, 4 Wis. 554.*

But the necessity of making the purchaser a party, or even of having two suits or two partitions in the same suit, instead of one, if the shares can still be fairly set off to the co-tenants, might seem to be a consideration going only to the costs of the proceeding, rather than an objection upon which alone the deed could be held void. The only ground upon which courts would seem to be justified in treating the deed as void, as against the co-tenants, is the impracticability of setting off their shares, in as advantageous a form as if the deed had not been made; and this, as already suggested,

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would seem to depend upon the amount and condition of the property, and the special circumstances of each particular case.

In a direct proceeding for partition, the condition and amount of the property and all the circumstances bearing upon the practicability of making a fair partition, can be (and are by the usual practice) inquired into and ascertained; so that the court can, in such cases, see and determine whether effect can be given to the deed and a fair partition still be made. And though in such partition the purchaser of an interest in a part were not a party, yet by the ordinary and correct practice of the court there would be a reference to ascertain and report the state of the title; and the interest of such purchaser ought, therefore, to appear. And whenever this does appear, unless something should appear to show that the conveyance was not fair or for a valuable consideration, it is not perhaps easy to see why the court upon principles of equity, should not seek to protect the interest of such purchaser, so far as this could be done without injury to the co-tenants; and if the share of such purchaser could not be set off to him, that it should, at least, be set off to the original co tenant who made the conveyance, as a part of his share, if found practicable without injury to the others, so as to give the purchaser an opportunity to enforce his rights, as against his vendor, by a partition of that portion of the property. See authorities above cited, especially *Robinett v. Preston's heirs, 2 Robinson, 273; McKee v. Barley, 11 Gratt. 340; Holcomb v. Coryell, 11 N. J. 548.* This duty might seem to result from the doctrine of most of the cases, that the deed is only to be treated as void so far as it injuriously affects the cotenants, and that it is good against the grantor and those claiming under him. But see *McKey v. Welch, 22 Texas, 390.* When the question of the validity of the deed arises collaterally as it does here, cases may certainly occur in which, owing to the peculiar circumstances and the nature

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and number of such conveyances, enough may appear to the court to enable them to see, beyond all question, that such conveyance, if held effectual, must necessarily prove injurious to the co-tenants. And whenever this does so appear, the reason for holding the conveyance void, to this extent, as against the co-tenants, is sufficiently intelligible.

But where the question arises collaterally, as in this case, and enough does not appear to enable the court to see that giving effect to the deed must necessarily prejudice the co-tenants, in setting off their shares, the principle upon which courts can *a priori* and without ascertaining the condition of the whole property, and all the material circumstances, hold such conveyance void, is certainly not very clear And, in view of the reason upon which alone the rule purports to rest — the injury which may be done to the co-tenants, which they may waive — the principle on which the conveyance can be held void, so as not to pass the title of the grantor, as to all except the co-tenant, would seem to be involved in some obscurity. In Virginia it has been expressly held that such conveyance by one tenant in common of his interest in a part of an entire tract held in common, passes the title of the grantor in such part, not only as against himself and those claiming under him, but as to all other persons except the co-tenants injured by it; and, as to them also, except so far as they would be injured. And this is said to be the fair result of the Massachusetts doctrine and that of other authorities which hold the deed voidable on account of the injury to the co-tenants, and not absolutely void. *Robinett v. Preston, 2 Robinson (Virginia), 273; McKee v. Barley, 11 Grat. 340; and see Holcomb v. Coryell, 11 N. J. (3 Stockt.) 548.*

No distinction seems to be made in the authorities between a sale by the tenant himself and a sale on execution against him. But where, as in some of the New England States, no sale is made upon the execution, but the land is set off and possession delivered to the creditor, it is possible

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that this necessity of delivering possession may furnish a better ground for holding the proceeding void, in such a case, than may be found to exist in the case of a sale. Again, the rule which is to render void the conveyance by one tenant in common of an undivided interest in the whole of one, or several parcels, where there are other parcels held by all the same tenants in common, must, in its application, be limited *somewhere;* since, if applied to cases where large amounts of property are held in common even in the same county, to say nothing of different counties and different States, the remedy to be secured by holding the conveyance void might sometimes be worse than the evil to be remedied; as it might tend materially to check the power of sale, and drive the owners to the expense of a partition when, otherwise, it would be unnecessary.

It was suggested by complainant's counsel, that the rule would be restricted to cases where all the tenants held under the *same title.* But the *reason* of this rule in the case of a tenancy in common, has no connection with the *mode* in which the *title* was acquired. It grows simply out of the common ownership, without reference to the mode of its acquisition. And all the property thus held in the same jurisdiction might be partitioned in the same suit, however numerous or diverse the titles by which it was acquired. No unity of title was ever necessary in the case of tenancy in common, and at common law seldom existed. Any limitation of the rule upon this basis, though it might sometimes be convenient, would be merely arbitrary. *Peabody v. Minot, 24 Pick. 329,* limits the application of the rule to all the common property in the same county; because the jurisdiction, upon partition, was co-extensive with the county; while in *Thompson v. Barber, 12 N. H. 563,* it was held to extend to all within the State.

In view of all the difficulties in fixing, upon principle, any just and practicable limitation in the application of the rule, it may admit of some doubt, whether the rule should

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be extended beyond a single parcel. Upon this point the authorities may be regarded as yet equally balanced: Connecticut and Maryland being one way, and Massachusetts and New Hampshire the other.

But whatever may be the force of the rule or the extent of its application, if it applies to the execution-sale, and defeats the title of Driggs and Butler, it must apply with at least equal force, and much more clearly, to defeat the title of the complainant.

The deed from Theodore J. Campau to the complainant conveyed, not one-ninth of all the property held in common by the same tenancy, nor even of the whole so held in the county of Wayne, but one-ninth of these lots and the other lands attempted to be conveyed to him in severalty as his share. And such was the case of every conveyance executed by each of the heirs who executed deeds to each of the others. Complainant's counsel insist that the objection to such conveyance by one tenant in common only applies when made to a stranger; and where, for instance, there are but two tenants in common, one of whom conveys to the other, this is doubtless true; as the other tenant, by taking the conveyance, waives the objection. But when there are several other tenants in common (of the same and other lands) besides the grantor and the grantee, the injury to them would be precisely the same as if the conveyance had been made to a stranger, and the same difficulties would be encountered in setting off their shares upon partition.

It is true, that if all the heirs or tenants in common, including the children of James J., had joined in making such partition and conveyances, as each would have received his share, there being none of the co-tenants who could thereby be injured, the deeds must have been effectual as to all, so far as this point is concerned.

But these conveyances of all the other heirs except the children of James J. dividing up the whole estate among

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themselves, entirely ignoring the interest or share of these children, are far more objectionable than the conveyance by a single tenant in common of an interest in any number of parcels less than the whole, held by the same tenancy. These conveyances must, as to the heirs of James J., be held void to the extent of one-ninth, or they could receive nothing, either in common or in severalty. And to give any effect to all these conveyances, the heirs of James J. in obtaining partition, must, even if they took their shares collectively, take a portion equal to one-ninth by metes and bounds in every separate tract, lot or parcel of the entire estate of Joseph Campau, unless, owing to the great amount of the lands of the estate, it should be found practicable to take in a satisfactory form in larger parcels an equal amount in value from each of the heirs conveying. And in that event the deeds of the heirs to each other, must be treated as void to that extent.

This result the court can not fail to see, without any inquiry into facts beyond those appearing in the records, must be much more likely to prove injurious to them, than the execution-sale to any of the parties, and more likely to diminish the value of their shares.

And, in making a partition to which the heirs of James J. are entitled, some of these deeds must be held invalid to some extent, and this would naturally lead to the necessity of treating them all as void, even as between themselves, unless the obstacle should be capable of being removed by the great extent of the estate, as above suggested.

Upon such partition there can be no certainty that the particular lots now claimed by the complainant, would fall to his share.

In fact, if a suit for partition should be had in which the purchaser under the execution-sale should be ignored, these lots, for aught we can discover, would be as likely to be set off to Theodore, as to the complainant; and he might then be estopped as to the purchasers under the execution,

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in a partition sought by them, according to the principle of some of the authorities above cited.

But we need not determine whether these deeds were void, nor whether complainant claiming under Theodore is estopped to deny the validity of the execution-sale, since, if the sale on the execution was void, because confined to Theodore's interest in separate parcels (less than the whole number) of the property held by him and the other heirs in common, as contended by complainant's counsel, for the same reason and under the same rule, the conveyance by Theodore to the complainant was also void; and the complainant has failed to show title.

If the conveyance of Theodore to complainant was not void for this reason, then the sale on the execution was valid, so far as this objection is concerned; and the defendants, Driggs and Butler, have shown title; and the complainant must fail on this ground, unless the execution-sale is void on some other ground, or the complainant shows some other ground for relief.

The only other ground upon which the sale on execution is claimed to be void, is that the levy was excessive. The fair value of the interest sold in the five lots (of which complainant claims three), had the estate of Joseph Campau been settled and the title perfect, would have been from eight to ten thousand dollars.

But to three of the most valuable lots the deceased appeared to have no record title, having held them by possession only; and the estate was unsettled at the time, and involved in a great amount of litigation between the different heirs, and between them and the administrators, with no reasonable prospect of an early settlement of the estate; so that it would have been difficult to fix any definite value upon the interest so sold.

The sale being at public auction, open and fair, and no fraud being shown or pretended, we do not think it can be set aside or treated as invalid in this proceeding, on the

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ground of an excessive levy, or because it sold for much less than its value; especially, as the sale was subject to a year's redemption.

As an excessive levy merely, it is clear the remedy would have been by motion to the court from which the execution issued, and before sale, to set it aside. Every court controls its own process. No such motion having been made, and the whole year's redemption having expired and the deed been given before any relief is sought, the objection is one purely of inadequacy of price for which the sale was made. The remedy for this also, if any, was by motion (*See Cavenaugh v. Jakeway Walk. Ch. 344*), which should have been promptly made. See *Noyes v. True, 23 Ill. 503*, which was a bill to set aside a sale for inadequacy, and it was held that, having neglected for the whole year (given for redemption) to make a motion on this ground in the court issuing the execution, and no excuse being shown for the delay, there being no fraud shown, complainant was not entitled to relief in equity.

In *Reed v. Brooks, 3 Littell, 127*, mere inadequacy of price, however great, was held not sufficient for setting aside a judicial sale on motion. And no case has been cited, nor are we aware of any, in which an execution sale of real estate has been set aside, on motion or otherwise, for inadequacy of price alone, especially when, as in this case, it was subject to a year's redemption. The statute giving a year's redemption seems to rest mainly upon the idea that real estate may be sold for less than its value; and to give the time of redemption mainly on this ground. This is an adequate remedy; and if the debtor will not avail himself of it, he can not complain of it. Public policy requires that judicial sales which have been open and fair, and nothing done to prevent a sale at a higher price, should not be disturbed on the ground of inadequacy; since the effect of an opposite course would be to deter bidders, and render the prices on such sales still less. And any rule which might

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be laid down as to the degree of inadequacy would be wholly arbitrary.—*Hammond v. Scott, 12 Mo. 11; Meirs v. Zell, 7 Id. 331.*

But that such sales cannot be set aside on this ground alone, at least in a collateral proceeding, see *Hart v. Bleight, 3 B. Monroe, 273; Bank v. Hassert, 1 Saxt. (N. J.) 1; Exrs. of Simmons v. Vandegrift, Id. 55; Roe v. Ross, 2 Ind. 99; Benton v. Shreeve, 4 Ind. 66; Newman v. Meek, 1 Freeman's Ch. 458; Mercereau v. Prest, 2 Green's Ch. 460; Outcalt v. Disborough, 2 Id. 218; Carson's Sale, 6 Watts, Penn. 140; Cooper v. Galbraith, 3 Wash. C. C. Rep. 546.*

But lastly, the complainant insists that, if the execution-sale is valid, he ought still to be permitted to redeem. This claim is sought to be sustained on the ground of certain conversations or attempted negotiations between Theodore and Mr. Cheever, who had been the attorney of the execution-creditors in obtaining the judgment and making the sale. But aside from the facts that the sale was made to Godfrey, Dean & Brow, whose certificate was on file and notice to all parties, and that Cheever had no authority to make any arrangement which should affect the sale, we do not consider it as quite certain that any of the conversations in relation to the subject took place until after the year's redemption had expired. However this may be, the subject of those conversations seems to have been confined to an attempt on the part of Theodore to get a deduction from the amount of the judgment, without any reference to the question of extending the time of redemption; and even upon this point no agreement was ever arrived at.

It is clear from the evidence, that all the most important of even these conversations (if any of them could be of any importance), were had after the year allowed to Theodore to redeem had expired, and just prior to the expiration of the fifteen months allowed to creditors for redemption: Theodore evidently supposing that he had fifteen

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months to redeem, instead of a year; and, finding he could get no deduction, then undertook to redeem.

Complainant himself was aware of this sale before the time of redemption expired, and relied upon Theodore to redeem. He stands in no better position than Theodore himself. The claim to redeem, therefore, rests upon the culpable negligence of Theodore and the complainant, or their ignorance of the law, neither of which will authorize the court to grant the redemption, without going far beyond the recognized grounds of equity jurisdiction.

The two points last considered present the only questions necessarily involved in this case; because, as already shown, if the sale under the execution was void, as confined to an interest in certain parcels less than the whole, then, upon the like ground, the conveyance from Theodore was invalid; and complainant has shown no title. If, on the other hand, the sale on the execution was not invalid on the ground supposed, the defendants, Driggs and Butler, have shown a good title, and in either event the complainant has equally failed to sustain his bill.

The decree of the court below must therefore be reversed, and the bill dismissed; and defendants must recover their costs in both courts.

COOLEY CH. J., concurred.

GRAVES, J.

I agree with my brother Christiancy in holding, and upon the grounds stated by him, that if the levy and sale on execution were invalid by reason of being limited to Theodore Campau's undivided interest in a part of the several parcels owned by him in common with the other heirs; that then, by the same principle, the conveyance by Theodore to complainant was likewise invalid, wherefore the latter acquired no title, and has consequently failed to show one in support of his bill: and on the contrary, if such

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conveyance to the complainant was not rendered invalid by such circumstance, then the levy and sale on execution could not be defeated on that ground. I also agree with him in holding that the bill cannot be supported on the idea that the levy was excessive; nor upon the ground that Theodore was mistaken or misled as to the time given for redemption; nor upon the notion that an arrangement was made for a longer time than that prescribed by statute, and accordingly I concur in the result. As this view is sufficient to dispose of the case, I am not at present inclined to go beyond it.

CAMPBELL J.

I concur in dismissing the bill upon two grounds. I do not think, if the levy was good, that the facts set forth furnish any sufficient reason for avoiding the sale either as excessive or as left unredeemed through mistake or misrepresentation. There is no sufficient reason shown for the failure to redeem, which would create an equity against the purchasers.

I also think that Campau's rights in the particular lots in dispute depend upon analogous principles to those which he sets up against defendants. The same reasons which he claims as invalidating their title, would prevail to disprove any such title in him as must exist in order to maintain this bill. If correct in his claims against defendants, there is no certainty that he will ever own the lots in question, which may fall to some one else on the partition; and if this be so, he cannot claim any peculiar right to have the alleged cloud removed. He and the defendants, upon his theory, occupy similar positions, and he can, upon this ground, have no superior equities.

I therefore am not disposed to enter upon any inquiry into the legal or equitable rules regulating the dealings of tenants in common. As no impressions given under such

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circumstances would have any force as authority, I prefer to reserve any expression upon the subject until it is required by some actual necessity, when it can be given under the light of existing facts. I now concur in the judgment for the reasons given, because the complainant has not put himself in any position to assail the defendants, or to invoke any principle which will aid him more than it will them.

Andrew Heimbach v. Samuel Weinberg.

Case made: Repeal of law for review of. Where a case made for review upon the facts appears to have been settled after the law authorizing such review was repealed, the Court cannot consider it.

Agency: Settlement on behalf of father for damages for seduction of daughter. A daughter who was a minor, having been seduced, the defendant was employed by the father to collect of the seducer damages therefor, and the daughter gave him a power of attorney on the supposition that it was important to enable him to effect the object. He settled with the seducer, on receiving from him his note on time for $125, and an equal amount in cash, and delivered the note to the father, but withheld all knowledge of the receipt of the money, and declared that the note was all he obtained. Suit being brought against him by the father to collect the balance, he defended on the ground that the daughter was the proper plaintiff. It *seems* that on this state of facts, the father was clearly entitled to recover.

Submitted January 6th. Decided January 11th.

Case made from St. Joseph Circuit.

This was an action for money had and received. The facts are stated in the opinion.

Judgment was rendered for plaintiff below.

Wm. L. Stoughton, for plaintiff.
Hewitt & Lyon, and *H. F. Severens,* for defendant.

GRAVES J.

The plaintiff brought an action against the defendant for money had and received, and upon the trial before the court without a jury, the court found the facts to be as follows:

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The plaintiff's daughter being under age, was debauched and made pregnant by one Jeremiah Good in this State, and Good afterwards became a resident of Pennsylvania. The plaintiff applied to the defendant, who was going to Pennsylvania, to settle his claim against Good for the seduction and debauching of his daughter, and gave the defendant $25 for so doing. The daughter being still a minor, made her power of attorney to the defendant, authorizing him to make the settlement: the parties supposing this step to be necessary to effect the object. Under such arrangement, the defendant, in January, 1861, settled with Good, for $250 and received at the time $125 in money and the note of Good with security for $125 more, and which note was delivered by the defendant to the plaintiff and paid at maturity by Good to the latter. The defendant concealed from the plaintiff for a long time, his reception of the $125 in money and alleged that he had received the note only. The Court also found that the plaintiff was entitled to a judgment for $142.50 with costs; and judgment was accordingly so entered on the 6th day of February, 1863.

The foregoing presents the facts found; but we observe that all the evidence in the case is also sent up with the findings.

According to the record, by which we are necessarily governed, the case itself was not settled until March, 1868; and although it appears to have been intended that we should review upon the whole evidence, we are precluded from so doing by the circumstance that the record conclusively shows that the case was made after the Act of 1867, (*Laws of 1867, p. 198*) which took away the power to review upon the facts. As this record is constituted, we can only consider the questions of law raised by exceptions to the findings of law and to the rulings upon the points submitted under rule 87 of the rules of the Circuit Court. The only finding of law in the case is, that upon the facts found the plaintiff was entitled to recover $142.50 on the 6th of February, 1863.

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There is nothing in this of which the defendant could complain, since the facts found abundantly authorized it.

It is found that the defendant was employed by the plaintiff to obtain for the latter, satisfaction from Good on the plaintiff's claim; that the defendantassumed the agency, and received the money, but concealed from the plaintiff the receipt of it, and alleged that he had received nothing but the note. This note he delivered to the plaintiff; and so far as appears, without having discovered that his conversation with Good could have the effect of cancelling his engagement to his principal, and of relieving him from all accountability to his employer. When he withheld the money and denied its receipt, it could not have occurred to him that he could set the plaintiff at defiance by showing that in acting as his agent and in his business he had so demeaned himself as to preclude the plaintiff from insisting upon his paying the money over.

He must, at that time, have thought that his ability to keep the money depended upon concealment, and not upon the grounds that his doings in Pennsylvania extinguished the rights of his principal. We think he could not repudiate his duty to account to his employer; and that his denying the receipt of the money was tantamount to a refusal to account for and pay it, and precludes him from saying, in answer to the action, that it was not demanded before suit.

Four of the points presented under the rule referred to, related to matters of fact, and the Court responded to them by stating the facts otherwise than as contained in such points; and the rulings upon the remaining points so presented were supported by the facts as the Court had found them.

We therefore discover nothing in the record which would authorize or justify us in disturbing the judgment of the Circuit Court.

The judgment of the Court below must, therefore, be affirmed, with costs.

The other Justices concurred.

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Eli H. Hoover et al. v. Jacob Peters.

Sale of articles of food for domestic consumption: Implied warranty as to quality. Where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be by a retail dealer or any other person.

Heard January 6th. Decided January 11th.

Error to Bay Circuit.

This was an action to recover the balance of the purchase price of certain pork sold by plaintiff to defendant.

The defence claimed that the pork was purchased to be used as food, and that the plaintiff so understood it, and that it proved unfit for such purpose.

On the trial they asked the Court to charge the jury that if the facts were as claimed, that there was an implied warranty that the pork was sound, and fit for the purpose of food; but which was refused.

Judgment was rendered for plaintiff.

A. C. Maxwell, for plaintiff in error.

The record in this case presents the following:

I. When a farmer sells provisions to a consumer directly for food, is there an implied warranty that the goods are wholesome and fit for that purpose?

That such warranty exists has been held by repeated adjudications in this country.—*12 Johns. 468; 2 Chandler, Wis. 37; 3 Blackf. 165; 17 Wend. 267.*

Where a vendee buys for a particular purpose, he buys with an implied warranty of the *fitness of the thing, for the purpose intended,* whether the article is for food or not.—*6 Taunt. 108; 4 Barn. & Cress. 108; 5 Bing. 533; 3 Man. & Grang. 818; 8 Blackf. 317; 2 Man. & Grang. 279; 3 Id. 858; 5 Q. B., 288. Similar cases: 4 Gilman, 69; 1 Sm. & M. 381; 17. Wend. 269; 18 Id. 449; 10 Exchq. 342; 1 Williams, 227; 11 Ired. L. 166.*

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If the rule is well settled, that when a person buys goods for a *particular purpose*, that there is an implied warranty that the goods are fit for such purpose, why should not such rule extend to provisions? The reasons that may be alleged in favor of such rule are certainly strong. The security of human life is the greatest care of the law. The necessities of life are such as to make it important that food should be wholesome and unadulterated; and the same principle that holds a physician or apothecary responsible for reasonable care, might well sustain this rule of law.

II. *What* is a warranty, is purely a question of law. And the Court must decide it. It is a contract in every respect, as fully as any other contract known in the law.—*22 Pick. 48; 1 Vesey, Sr., 95; 14 Barb., 66; 1 Young, 407; 2 Kent's Comm. 482 et seq.; 1 Smith's Lead. Cas. 77, 207.*

Whether a warranty has been proved in a particular case, is a question of fact for the jury; but *what facts*, if proved, will make a contract of warranty, is a question of law.

In the facts shown in this case, the agent of the plaintiff (below) *did* make an express warranty of the property, as a matter of law.

It was a representation of an important fact at the time of sale, and during the negotiation, to purchase it.

It clearly appears that the goods were purchased for a particular purpose, of which the plaintiff was informed.

Grier and *McDonell*, for defendant in error.

With regard to the quality or goodness of articles sold, the seller is not bound to answer, unless he expressly warranted the goods to be sound and good, or made a fraudulent representation or concealment. The buyer is required to attend to those qualities of the article he buys, which are supposed to be within the reach of his observations and judgment; and this doctrine is well established in the English and American law.—*2 Kent Com. 478 (10th Ed.); 20 Johns.*

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196; 13 Ohio, 502; 39 Penn. St. 88; 42 N. H. 165; 23 Barb. (N. Y.) 521; 29 Maine, 508.

Those cases which "trench upon the plain maxim of the common law," *caveat emptor*, are unsound and *not* sustained by the weight of authorities.—*2 Kent Com. (10th Ed.) 480 note; 17 Wend. 267; 1 Denio, 378; 11 Ired. 166; 9 Watts, 55; 18 Wend. 428.*

And the exception to the general rule as to provisions, is confined to cases where the provisions are sold by *common dealers* for *immediate consumption* and *domestic use.—1 Denio, 378; 16 M. & W. 644; 10 Mass. 197; 3 E. D. Smith, N. Y. 324; 18 Wend. 428.*

It is not implied in *every sale* of provisions, that they are wholesome, any more than it is in sales of other articles where proof of a distinct affirmation is requisite. An *artifice* must be proved to entitle the sufferer to this remedy, equivalent to a remedy on an express warranty, as well in the case of provisions as in any other case. The difference is, that, in the case of provisions, the artifice is proved, when a *victualler* sells meat to his *customers* at a sound price, which at the time was stale or defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade.—*10 Mass. 197; 7 Hurl. & Nor. 586.*

But in this case the seller was not a victualler. He was no better qualified to judge of their wholesomeness than the buyer. There was nothing about his calling or experience upon which the public had a right to rely as a *warranty* of the soundness of his commodities. Where relations of trust and confidence exist, the law applies strict rules, and will regard that as fraudulent which, in other relations, would not be so regarded. It is upon an analogous principle that

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a *common dealer* of provisions is held to impliedly warrant the soundness of his goods. To judge of the soundness of his goods is his business—his study. He is presumed to have superior facilities for judging of the quality of provisions, and the public places confidence in his capacity and experience. But it would not only be unreasonable, but unjust, to apply such a rule of accountability to one who sells a load of provisions in bulk in open market. Such a sale does not, and should not, constitute an exception to the common law rule of *caveat emptor*.

CAMPBELL J.

To a suit for the balance remaining unpaid on the price of the carcases of three hogs sold by Peters to defendants below to be used as food in their lumber camp, they set up, by way of recoupment, that one of the carcases was unsound and unfit for use. The purchase was made from the son of Peters, who was informed, at the time, of the purpose for which they were bought.

The Court refused to charge that, if such facts existed, Peters could not recover for the unsound article, and was liable on an implied warranty of soundness, but on the other hand instructed the jury that where a person, as in this case, sells goods in open market, there is no such implied warranty, and no liability for faults in the absence of deceit, fraud or special warranty.

It seems to be settled by many authorities that no implied warranty of soundness arises where such articles are purchased by a dealer to sell again.

Whether this rule arises from the fact that any injury from the use of the articles is likely to be remote and not readily traced out, or because, where his purpose in buying is merely speculative, one commodity is not to be distinguished from another in its incidents as merchandize, or what special reasons have led to it, cannot easily be deter-

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mined. It stands as a recognized doctrine, whatever may have been its reasons.

But where property is bought for a particular purpose, and only because of its supposed fitness for that, there are many cases in which a warranty is implied, unless the purchaser has seen fit to act upon his own responsibility and judgment. And where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule which has often been recognized, that such sales are warranted, is not only reasonable but essential to public safety. There may be sellers who are not much skilled, and there may be purchasers able to judge for themselves, but in sales of provisions the seller is generally so much better able than the buyer to judge of quality and condition, that if a general rule is to be adopted, it is safer to hold the vendor to a strict accountability than to throw the risk on the purchaser. The reason given by the New York authorities, in favor of health and personal safety, is much more satisfactory than the purely commercial considerations which take no account of these important interests. While the question has not perhaps been very often decided, the principle has been generally accepted among the legal writers, and we feel no disposition to recede from it. We have been pointed to no distinction between sales in one market or another, and can conceive of no special reason for regarding one sale for this purpose as differing in its incidents from any other. The doctrine seems to be that any purchase for domestic consumption is protected.

We think, therefore, that for this reason the judgment should be reversed, and a new trial granted. The other points seem to have been presented properly.

COOLEY Ch. J., and GRAVES J. concurred.

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CHRISTIANCY J.

If, in addition to what appears in this case, it had further appeared that the plaintiff below, when he sold the property, knew it to be diseased, or had it appeared that he was the keeper of a meat market or butcher's shop and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed. But as the case does not show that plaintiff knew any thing more of the condition of the property than the purchasers, who seem to have had the same opportunity to judge for themselves, and plaintiff is not shown to have been engaged in a business which would authorize any presumption of knowledge, I do not think that in making this casual sale he was under any obligation of ascertaining at his peril the condition of the property in this respect.

In such a case the maxim of *caveat emptor* should, I think, apply. I therefore concur in the opinion of the Circuit Judge who tried the cause, as in my view founded on the better reason, and supported by the greater weight of authority.

Gabriel Smith v. William Lock and Another.

Sale of land bounded on a street: Right of purchaser to a way. Where one sells to another, a village lot which is described in the deed as bounded on a certain street, the purchaser is entitled as against the seller, to have such street kept open for his accommodation in the enjoyment of his purchase.

The question in such a case is not one of dedication, but of private right, depending upon the construction of the deed of conveyance.

Heard January 8th. Decided January 11th.

Appeal in Chancery from St. Joseph Circuit.

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SMITH v. LOCK AND ANOTHER.

The bill in this cause was filed to enjoin the defendant perpetually from closing up a certain street fronting complainant's premises. The facts are stated in the opinion.

The prayer of the bill was granted.

Wm. L. Stoughton, for complainant.

1. This case comes under the well recognized head of equity jurisdiction. Where privileges of a public nature, and yet beneficial to private estates, are secured to proprietors contiguous to places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction.—*2 Story's Eq. Juris. § 927; Corning v. Lowerre, 6 Johns. Ch. 439; Hills v. Miller, 3 Paige, 254; Trustees &c. v. Cowen, 4 Id. 510-514; Sinclair v. Comstock, Har. Ch. Mich. 404.*

2. It clearly appears that the defendant executed and acknowledged a plat of the village of Burr Oak, according to the requirements of the statute, and caused it to be duly recorded. This is sufficient to pass the title.—*1 Comp. L. §1133; Conner v. New Albany, 1 Blackf. 43; Com. Council &c. v. Croas, 7 Ind. 9; People v. Beaubien, 2 Doug. Mich. 256.*

3. An inspection of the plat shows that the land in question is a street. The location, width and course of Front street are clearly marked out. It is an inseparable part of the plat, and like every other street or alley its extent must be measured by its relation to it. The fact that an imaginary line is not drawn along a part of its south line, does not change its character as a street. It is sufficient if the necessary *data* are given to determine the length and breadth.—*Herrick v. Stover, 5 Wend. 581.*

It is designated on the plat as a "street." This imports a thoroughfare, not a *cul de sac—Holden v. Trustees of Cold Spring, 23 Barb. 103; People v. Jackson, 7 Mich. 432; Tillman v. People, 12 Id. 401.*

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The construction claimed for the plat, is in accordance with the requirements of the statutes, and ought therefore, to be preferred.—*Broom's Legal Max. 668; 2 Pars. on Con. 500; Booth v. McNair, 14 Mich. 19.*

And it is also supported by the subsequent acts and declarations of the defendant.

4. The defendant having executed, acknowledged and recorded the plat of the village of Burr Oak, with "Front street" designated as an open street, and having sold complainant his lot with reference thereto, cannot resume and exercise acts of ownership over it, which would deprive his grantee of any privileges or benefits to be derived from having such street left open.—*Trustees of Watertown v. Cowen, 4 Paige, 510; Nyman v. Mayor, &c., 11 Wend. 487-501; Livingston v. Mayor, &c. 8 Id. 85; Newport v. Taylor, 16 B. Monroe, 803; Kennedy v. Shipley, 15 Miss. 634; State v. Trask, 6 Vt. 355; State v. Cullen, 3 Id. 530; Cincinnati v. White's Lessees, 6 Peters, 432; Sinclair v. Comstock, Har. Ch. Mich. 412; 2 Washb. on Real Prop. 459; Smiles v. Hastings, 24 Barb. 44.*

At all events an easement or right of way passed to the complainant by the terms of his grant, and we think vested in him, in common with the public [*11 Wend. 501*]; but whether this be so or not he is equally entitled to protection.

J. W. Flanders, for defendant.

A Court of Equity will not restrain a man from making a reasonable improvement on his own premises, upon the ground that it cannot be made without depreciating the value of the adjoining premises, nor upon the ground that the edifice erected upon the adjacent premises does not possess any special privileges, protecting him from the consequences of such improvement either by prescription or grant, from the person making these improvements, or from the

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person under whom he claims title. — *Lasala v. Holbrook, 4 Paige, 169.*

A man is not answerable for the consequences of enjoying his own property, in the way in which said property is usually enjoyed, unless an injury results to others from the want of proper care or skill on his part. — *Radcliff's Ext'rs v. Mayor of Brooklyn, 4 Comst. 196.*

The village plat, admitted in the evidence and proofs taken in this case, establishes the fact that Front street extended no further east than Second street, and of this fact the complainant had full knowledge.

The grantee cannot take advantage of a misdescription known to him when he made the contract. — *Sug. on Vendors, p. 387, 388.*

The village of Burr Oak was laid out and the plat thereof was executed and recorded as required by law. — *1 Comp. L. Ch. XXVIII.*

It appears from the testimony of Wm. Betts, that Front street extended east to Second street; this fact appears also in the testimony of the defendant, who was one of the proprietors of the village, and helped to lay it out. No act of dedication or acceptance appears from the evidence of the land in question. — *People v. Jones, 6 Mich. 176; Tillman v. People, 12 Id. 401; People v. Beaubien, 2 Doug. Mich. 256; Cook v. Village of Hillsdale, 7 Mich. 115.*

COOLEY CH. J.

It appears by this record that Lock conveyed to Smith a lot in the village of Burr Oak, described as "commencing at the north east corner of the M. S. Railroad depot grounds in the village of Burr Oak, thence south one hundred feet, thence easterly along the line of the company's ground until it intersects the creek, thence northerly along the line of said creek until it intersects the line of Front street, thence westerly along said line of said street to the place of beginning."

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Afterwards, Lock claiming that Front street did not extend along the front of this lot, sold the land on the north side of the lot up to Smith's line to Hinkley, and Hinkley thereupon proceeded to build a house upon the land so purchased. This bill was filed to obtain a perpetual injunction. It was not disputed that there was a street known as Front street, extending to complainant's lot on the west, and which was fifty feet in width, and which, if extended in front of the lot in question would include the erection Hinkley is making.

Defendants appear to claim that if no street has been regularly laid out or dedicated to the public, in front of complainant's lot, this bill must be dismissed; but this is an error. The purchase of the lot described as bounded on a street, estops the grantor from shutting it up so as to prevent his grantee making use of it for his own accommodation in the enjoyment of his purchase. It is a matter of private right, and in no way depends upon the question whether the public have acquired a right of way or not.

The decree awarding a perpetual injunction must be affirmed, with costs.

The other Justices concurred.

Emeline S. Morton, Administratrix, &c., v. David Preston.

Estate of deceased persons: Right of administrator to recover property disposed of by heir. M. died in Michigan, owning shares in a New York corporation. No administrators being appointed, the widow and heirs placed their names on the certificate representing the stock under an agreement that it should be sent through W. D. M., one of the heirs, to a named person in New York for sale; and it was sent accordingly.

W. D. M., having thus received the certificate, and having sent it to New York in pursuance of the arrangement, subsequently, and without the knowledge or assent of the widow and other heirs, made an agreement to pledge it as security for a debt owing by him, and thereupon required the bailee of the certificate

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to deliver it to the creditor, which was done. The latter afterwards sold it and received the price. These facts coming to the knowledge of the widow, she took out letters upon the estate, and sued the creditor for the conversion of the property. *Held*, that she was entitled to recover.

Estoppel of administrator by acts previous to the appointment. The administratrix in such a case is not estopped by her previous action in endorsing the certificate from maintaining the suit in her representative capacity.

Trover: Damages for the conversion of certificate of stock. When a party wrongfully sells a certificate of shares of stock in a corporation, under such circumstances as to make him liable in trover, it is the shares of stock that he is to be considered as having converted, and not merely the paper certificate which represents those shares. He cannot claim, therefore, to be liable only for nominal damages for such conversion.

Heard October 23d, 1868. Decided January 11th.

Error to Wayne Circuit.

This was an action of Trover brought to recover damages for the conversion of certain shares of stock.

Judgment was rendered in favor of the defendant below.

The facts are stated in the opinion.

D. J. Davidson, and *A. Pond*, for plaintiff in error.

1. Although the property represented by the certificate in question be considered as being situated in the State of New York where the corporation exists, yet the plaintiff may maintain this action.

a. Upon grant of letters, the administrator is clothed with the legal title to all the personal property of the intestate, including choses in action.—*Beecher v. Buckingham, 18 Conn. 110; Perkins v. Stone, 18 Id. 276.*

b. This title takes effect by relation at the time of the death of the intestate, and the administrator may maintain an action for a wrongful intermeddling with the estate occurring prior to grant of letters.—*Fisher v. Young, Bulst. 268; 9 Wend. 302; 2 Hill, 181.*

c. This legal title extends to the personal property and choses in action of the intestate situated without the State. *Shultz v. Pulver, 11 Wend. 363; Perkins v. Stone, 18 Conn. 270; Rand v. Hubbard, 4 Metc. 252; Hutchings v. State*

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Bank, 12 Id. 422; Swarez v. Mayor, etc. of New York, 2 Sandf. Ch. 173; Brown v. Brown, 1 Barb. Ch. 189; Peterson v. Chemical Bank, 32 N. Y. 21; Evens v. Tatem, 9 Serg. and Rawle 258; Swearingen's Exr. v. Pendleton, 4 Id. 392; McNamara v. Dwyer, 7 Paige, 239; Guilick v. Guilick, 33 Barb. 92.

The executor or administrator represents the person of the intestate, and so far as the title of personal property is concerned, stands in his stead, being his "assignee in law." *Shultz v. Pulver, 11 Wend. 363.*

d. The rule prohibiting foreign executors or administrators to prosecute or defend in their representative character, without the previous ceremony or qualification of probate and letters, rests upon a mere personal disability. Courts simply withhold their aid in enforcing the title of such foreign administrators, by reason of their solicitude to protect the rights of creditors and legatees resident in the jurisdiction in which the assets are found. — *Doolittle v. Lewis, 7 Johns. Ch. 51; Holmes v. Remsen, 4 Id. 472; Thorne v. Watkins, 2 Ves. Sen. 35.*

2. The defendant, by the transfer to him under the circumstances shown by the record, obtained, as against the plaintiff, no title, legal or equitable, to the certificate of stock in controversy.

a. The certificate was not so indorsed as to pass the legal title by delivery.

b. It did not come to the hands of the defendant with this indorsement upon it, under such circumstances as to estop any of the heirs of Julius D. Morton to whom the certificate was issued, from denying that the title, legal or equitable, passed to him.

The certificate was indorsed, as shown, and delivered to Wm. D. Morton, not to sell or transfer to the defendant or to any one else, but for the sole purpose of transmitting to Buffalo. He had so transmitted it, and thus the express

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authority conferred upon him by the other heirs was at an end.

Hence, the defendant can claim nothing against the other heirs, upon the ground of any authority expressly given to Wm. D. Morton.

And as the indorsement carried with it no evidence of title, he can claim nothing upon that ground.

c. The plaintiff, in her character as administratrix, is not estopped from denying that the title, legal or equitable, passed to the defendant.

All she did was to endorse with her own name the certificate of stock, for the purpose of enabling it to be transferred upon certain contingencies, which never happened, to some one, other than the defendant, and the defendant obtained possession of it with this endorsement upon it, without her knowledge or consent, and without any intention on her part to transfer the title to him. — *Wilson's Admx. v. Hudson, 4 Harrington 168; Doe dem. Hornby v. Glenn, 1 Adol. and Ellis, 49.*

3. The defendant having converted the certificate, which represents the title to the property in question, to wit, the stock, is liable as for a conversion of the stock.

Any interference with or control exercised over property under a claim of right, inconsistent with the rights of the owner, is a conversion.

The defendant claims the right to retain, and did retain the certificate, which was the only evidence of title to the stock, upon the ground that he was entitled to it as the owner of the stock; and in disposing of the certificate, claimed and assumed to dispose of the stock, and has thus assumed an interference with the property inconsistent with the rights of the complainant, and is guilty of a conversion of it.

It is well settled that Trover will lie for the conversion of a chose in action, such as a promissory note, bond, title deed, and certificate of stock; and the measure of damages is the value of the property represented by such chose in

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action. — *Bradley v. Gamelle, 7 Minn. 331; O'Donoghue v. Corby, 22 Mis. (1 Jones), 394; Webber v. Davis, 44 Maine, 147; Gibbs v. Chase, 10 Mass. 128; Miller v. Baker, 1 Met. R. 31; Common v. Hillier, 11 S. C. L. R. (Rich.) 193; Anderson v. Nichols, 28 N. Y. 600; Clowes v. Hawley, 12 Johns. 484; Parry v. France, 2 Bos. and Pull. 451; Robbins v. Packard, 31 Vt. 570; Stone v. Clough, 41 N. H. 290; Murray v. Burling, 10 Johns. 170; Bowling v. Nash, 10 Cush. 418; McCombie v. Davis, 9 East, 538.*

Walker & Kent, for defendant in error.

1. It is now settled that the title to stock, as between the parties, may be transferred by a transfer of the certificate endorsed in blank.—*Com. Bk. v. Kortwright, 22 Wend. 348; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30; Mandlebaum v. North Am. Min. Co. 4 Mich. 465.*

2. In this case the plaintiff and other persons entitled to the estate of J. D. Morton, by endorsing the certificate in blank for the purpose of a sale, and by entrusting it to Wm. D. Morton, gave him an apparent authority to pledge the same, and they are as much bound by his act as though they had expressly assented thereto.—*Ex parte Swan, 7 Com. Bench (N. S.) 400; S. C. 7 Hurlstone & Nor. 601; Davis v. Bradley, 24 Vt. 55; Booth v. Bruce, 40 Barb. 114; State B'k v. Hastings, 15 Wis. 75; 16 La. An. 127; 15 Mass. 389; Story on Agency, 127.*

3. The heirs and distributees of an estate, where there are no debts, may settle it and dispose of the personal property without administration; at least they can pass a title which shall be good against themselves. — *Babbitt v. Bowen, 32 Vt. 438; Taylor v. Phillips, 30 Id. 238; Kilcrease v. Shelby, 23 Miss. 161; Reid v. Butt, 25 Geo. 28; 29 Id. 585.*

The case of *Cullen vs. O'Hara, 4 Mich. 132*, will be cited as sustaining a contrary doctrine, but we submit that so far as it does this, it should be overruled.

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4. The taking out of letters of administration by plaintiff related back to the transfer of the certificate in question and legalized the same, even though otherwise void.—*Alvord v. Marsh, 12 Allen, 603; Priest v. Watkins, 2 Hill, 225; Giles v. Churchill, 5 N. H. 337; Mayner v. Ryan, 19 Mis. 196; Vroom v. Van Horne, 10 Paige, Ch. 557; Cross v. Teilington, 2 Murphy, 6; Whitehall v. Squire, 1 Salkeld, 296; Vaughan v. Brown, Andrews, 333; Carlin v. Vernon, 5 Durn. & East, 590; 8 Johns. 98, 125; Givens v. Higgins, 4 McCord, 286; 15 Mass. 325.*

5. If the transfer to defendant of the certificate was void, then defendant has converted nothing but the certificate itself, and not the shares it represented, and the damages suffered are only nominal.—*2 Taunt. 439; 7 Serg. & Rawle, 285.*

6. The corporation which issued the stock in question exists only by virtue of the laws of the State of New York, and every transfer thereof is regulated only by the laws of that State.—*Black v. Zacharie, 3 How. 511.*

The plaintiff is administratrix of the estate of J. D. Morton, only in Michigan. Her authority would not be recognized in New York; hence, she has not the legal title to the stock in question.

GRAVES J.

The plaintiff in error brought trover in the Court below against Preston, to recover damages for the alleged conversion by him of a certificate for fifty shares of stock of the Buffalo and Detroit Transportation Company, and which certificate, and the stock represented by it, Mrs. Morton claimed to have belonged to the estate of her late husband.

It appeared in evidence on the trial, that Mr. Morton died intestate in this State, in February, 1865, leaving his widow, the plaintiff, and three children; namely, J. Sterling Morton, William D. Morton, and Emma Morton, all of full age, him surviving. It further appeared that after the death

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of Mr. Morton, the certificate in question was found among his papers and taken possession of by his family. The estate not appearing to be indebted, no step was taken to administer upon it at the time, and the children mutually agreed that Mrs. Morton and her daughter Emma should occupy the homestead and receive and use the income of the estate for their support, so far as necessary, and preserve the property; and that upon the death of Mrs. Morton the estate should be divided among the children. It having been subsequently thought advisable to convert the stock in question into money in order to invest the proceeds in real estate security, the widow and children, to effectuate that object, in August or September, 1865, placed their names upon the certificate, and caused their indorsements to be attested by two witnesses. The certificate thus written upon, was placed in the hands of William D. Morton, one of the children, with express instructions to send it to one Armstrong, at Buffalo, to be by him sold and converted into cash. Young Morton then transmitted the certificate to one Gridley at Buffalo, to be by him handed over to Armstrong if the latter could sell it, but it was not sold. About the first of November, 1865, the defendant Preston, who was a Banker at Detroit, held a note for $4,200 made by one Wilkins and endorsed for the accommodation of the latter by said William D. Morton, which had matured and was unpaid. Preston urged young Morton to pay the note, and threatened to institute legal proceedings against him if the matter was not satisfactorily arranged.

Morton was then expecting to be elected cashier of a new bank about to be organized in Detroit, and was apprehensive that a suit against him on the Wilkins' note would impair, if not destroy his chance for an election. He thereupon offered to take up the Wilkins' note by substituting his own, but Preston declined to arrange the matter on that basis unless Morton would give additional security. Morton then proposed to give the stock as security, but informed Preston that the certificate was issued to the father.

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Julius D.; that it had been endorsed by Mrs. Morton, and the heirs, and was then in Buffalo to be sold. Preston acceded to this proposal, and young Morton thereupon gave his own note for the amount of the Wilkins' note and an order on the custodian of the stock at Buffalo for the delivery of the certificate, and Preston surrendered the Wilkins' note to Morton. In this negotiation between William D. Morton and Preston, the former talked about the stock as though it belonged to him; but the latter did not ask him whether he owned it or not.

At this time, young Morton was cashier of the Farmers and Mechanics Bank of Detroit, and the transaction referred to, occurred at the office of Preston in the same city. After acquiring the order from Morton, Preston, by means of it, obtained possession of the certificate.

This disposition of the certificate by William D. Morton was wholly unauthorized by Mrs. Morton, and the brother and sister of William, and was unknown to them until some time in the following spring, when Preston, on being applied to by one of the heirs, and before he had obtained actual possession on the order, refused to give up the stock. On the 29th of December, 1866, the stock was sold by Preston for $4,750, and on the 12th of November, 1867, Mrs. Morton was appointed administratrix of the estate; and thereupon she caused a demand to be made upon Preston for the delivery of the certificate, and at the same time offered to return the Wilkins' note.

The sum for which the stock was sold, together with the interest from the time of sale, amounted to $5,217 18. The defendant Preston, testified, among other things, that when he made the arrangement with young Morton, he had no knowledge that the latter was not acting in good faith in making the transfer, and supposed that he was the owner of the stock. He further testified, that it was customary for bankers to loan money on certificates for stock, endorsed in blank; and that when he received the order for the

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stock from Morton, the latter stated that the stock was in Buffalo for sale, and that he could pay him, Preston, when the sale should be made.

He also testified, that on receiving the order, he sent to Buffalo and had the stock held subject to his order.

It likewise appeared in evidence, that the balance due from Preston, after deducting the amount of the notes of William D. Morton, had been tendered, and that it was agreed that such balance should not be considered in the case.

The errors assigned are quite numerous, but we think that some of them are not material to the decision of the case, and that the others do not require to be separately considered.

It may be doubted whether upon the theory of the defense the plaintiff's right to maintain the action could be resisted. The stock belonged to the estate, and no administrator had been appointed. The family wished to sell, but had no design to pledge the stock as security for the debt of any person. The certificate was placed in the hands of W. D. Morton for the sole purpose of being sent to Armstrong, who was to sell it if he could, and who was alone confided in by the family to make the sale. It was not at the time of the arrangement with Preston in the hands of young Morton, but was in Buffalo, where it had been sent according to the design of the family. These facts were not disputed. If, as a matter of fact, Preston was led to believe by or without any representation on the subject on the part of young Morton that the latter was the owner, it is difficult to conceive how any such belief, under the actual circumstances, could avail him as a defense against the claim of the true owner.

It appears that at the very time of the arrangement, Morton had not the evidence of ownership sometimes implied by possession; and it is manifest that the instrument was

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not so endorsed for the purpose of transfer as to answer the requirements of the law merchant regulating the mode of transfer of commercial paper. The certificate was issued to Julius D. Morton, but the indorsements consisted only of the names of his widow and children. If it be admitted, therefore, that the certificate had the same negotiable qualities which belong to commercial paper, and required no greater or other formalities to work a change of title, which is the utmost that has been claimed for it, it is evident, I think, that the endorsement in question was not such, as thereupon to make the legal title pass by delivery.

The form and nature of the indorsement were apparently insufficient to work a technical transfer of the legal title, and to see this, was, in legal contemplation, to know it.

It seems to me, therefore, that the circumstance that young Morton never in fact possessed any authority to sell, or pledge the certificate, and neither had possession nor the right to it, and the additional circumstance that the indorsement, as it stood upon the paper, was *prima facie,* insufficent to pass the legal title, completely answer the claim set up by the defense.

Whatever may be thought, however, of this view of the present case, the Court are of opinion that the case of *Cullen v. O'Hara, 4 Mich. 132,* which was decided upon much consideration, and from which we see no reason to depart, is decisive of the most material questions presented by this record.

In that case, O'Hara, as administrator of Ann O'Brien, brought trover against Cullen to recover for the conversion of gold coin amounting to $585.

The substantial facts were that the plaintiff's intestate died in November, 1848, in possession of the coin, and without having made any will; that during her last sickness she stated to her attendant, one Catharine Vaughan, that the principal part of the property in her possession belonged to the estate of her brother, one James O'Brien, who had

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died inestate some time before in New York, leaving an infant child named Ann O'Brien, his next of kin and sole heir, for whom Cullen was guardian, and that upon the death of Ann O'Brien, the elder, her attendant, Catherine, delivered to Cullen the coin in question. It was also proved that in September, 1849, when O'Hara and Cullen were aware of all the facts and of the claims of each, the former, in his individual capacity, borrowed of the latter $200 of the coin in dispute, and gave his bond and mortgage to secure its repayment, and that the mortgage had been foreclosed when the trover suit was tried. O'Hara, as administrator, demanded the coin of Cullen, who refused to deliver it. It did not appear that any administrator had been appointed on the estate of James O'Brien.

On the trial, Cullen requested the Court to charge the jury that the plaintiff, by loaning the $200 from Cullen, and giving his bond and mortgage therefor, was estopped from maintaining the action; and that if the jury believed that any part of the money was in the plaintiff's possession, at the commencement of the action, the plaintiff was not entitled in any event to their verdict for such portion.

The Court refused to charge as requested, but stated to the jury in substance, among other things, that if the money belonged to the estate of James O'Brien and was taken possession of and held by Ann O'Brien in opposition to the rights of the heir, her right to possession passed to the plaintiff as her administrator, and that the latter could be held accountable only to an administrator of James O'Brien, and not to his heir.

The case having been brought here, it was deliberately determined by this Court that the loan of $200 of the money in controversy having been made by O'Hara in his individual capacity, did not estop him from asserting his right to the money as administrator; that the possession of the $200 obtained by the loan in no manner impaired his right to maintain trover for it, in his representative character,

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against the defendant; and that the loan itself was as much a conversion as if it had been made to a third person.

It was likewise held that, under our law, when one dies intestate, the title to his personal property does not go to the next of kin, but remains in abeyance until administration granted, and then vests in the administrator, as of the time of the death of the intestate, and that the next of kin becomes entitled only after administration, and then simply to the surplus remaining after the debts of the intestate and expenses of administration are paid.

It was also decided that when, in consequence of the death of the owner, another is clothed with the possession of personal property, and assumes control of it, such casual possessor becomes responsible for the property, and may maintain the ordinary legal remedies, trover included, to defend it and for self protection; and further, that the administrator of such possessor may sue in trover for a conversion done after the death of the latter, and before the appointment of the former.

As we are satisfied that the principles, thus asserted, afford a perfect answer to the leading points presented by the defense, and accepted by the Court below, we do not deem it necessary to quote the reasoning stated in the report. If, as decided in O'Hara's case, his intestate could have maintained trover on her possession, and he, as her administrator, was entitled to the same remedy for a conversion after her death, and before his appointment, it must be admitted that the right of Mrs. Morton, as administratrix of the estate owning the certificate and stock, to maintain trover, cannot be doubted.

Upon the argument before us the defendant submitted a point not yet noticed, but which we think may be disposed of in a few words. He maintained that if the transfer by young Morton to Preston was void, it followed that the certificate only, and not the stock represented by it, was converted, and that consequently the damages could only be nominal.

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It is quite certain that both parties always before the trial, and thereat. and the court below in the charge, treated the certificate as a muniment of title possessing substantial value; and that the facts clearly show that by means of it the defendant in error realized in cash the full value of the stock; and we think it cannot be maintained that it had no other value than such as the paper gave it. It was legally the subject of the form of action adopted in this case, and a judgment against Preston for the conversion would have the effect to confirm the title obtained and passed by him, to the stock.

The judgment of the court below is reversed, with costs, and a new trial ordered.

The other Justices concurred.

John Raynor v. William P. Haggard.

Forcible Entry and Detainer Act: Tenant at will: Notice to quit. The statute, giving a summary remedy against tenants at will or by sufferance, whose estate has been determined, only allows it when such determination has been by a notice to quit. *2 Comp. L. §4985, subdiv. 4.*

Heard January 6. Decided January 11.

Error to Ingham Circuit.

This was a proceeding under the "Forcible Entry and Detainer Act," to recover the possession of certain premises purchased under a written agreement, and upon which default had been made.

The plaintiff gave no notice to quit under the statute.

The facts are stated in the opinion.

Judgment was rendered for defendant.

Johnson & Higby, for plaintiff in error.

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The only question in this case is, whether the Court erred in deciding that notice to quit was necessary.

The defendant was in possession under a contract for the purchase of the premises, one provision of which was, that if he should fail to make the payments as therein stipulated, he should, at the option of plaintiff, be considered a tenant at will; he refused payment, bought up an outstanding title, and claimed to be the owner of the premises. In other words, he disclaimed the plaintiff's title, by which the relation of landlord and tenant was terminated, and no notice was necessary.—*Adams on Eject., 4 Ed. 155; Jackson v. French, 3 Wend. 338; Jackson v. Wheeler, 6 Johns. 272; Jackson v. Deyo, 3 Id. 422; Doe v. Long, 9 C. & P. 773; Doe v. Grubb, 10 B. & C., 816; Doe v. Froud, 4 Bing. 557.*

Our statute, *Compiled Laws*, § *2,807*, requiring notice to terminate a tenancy at will, does not apply; for in this case the tenancy is terminated by the act of the defendant.

T. M. Crocker, for defendant in error.

The one error assigned presents two questions:

First. Whether notice to quit is necessary in all cases of tenancy at will, to lay the foundation for the summary proceeding provided for by the statute under which plaintiff in error commenced in this case.

Second. If notice is not always necessary, whether the denial of plaintiff's title by defendant, relied upon in this case, was sufficient to determine the tenancy, and warrant the commencement of the suit.

1. The statute provides for the determination of tenancies at will and by sufferance, by notice to quit.—*2 Comp. L.* § *2,807.*

By thus specifically providing for the determination of those estates, it, by implication, negatives any other manner. And the fourth subdivision of Sec. 4,985, under which this proceeding was instituted, must be construed with the section

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first named, to which it refers; and this subdivision gives this remedy only where the tenancy has been determined by notice to quit.—*2 Comp. L. 4,985; Huyser v. Chase, 13 Mich. 98; Woodrow v. Michael, 13 Id. 187; 2d Abbott's National Dig. 223.*

2. The denial of title did not determine the right of defendant in error to hold. The facts show that defendant entered under a contract of purchase—that when called upon to take the deed and make payment according to the terms of the contract, he assigned as a reason for not doing so, that the plaintiff had no title. This cannot be construed as a disclaimer. He was declining to pay the plaintiff for the land, and take title under him. Neither rent was demanded, nor possession, by plaintiff. Nothing was said by either that in any way referred to the relation of landlord and tenant.

The rule that a lessee will not be allowed to deny the title of his lessor is not to be applied in this case. Here the holding commenced under the agreement, which did not create the relation of landlord and tenant, and such relation does not commence until the contract is forfeited. It is only when that relation originally exists by force of the contract, or for want of one, that the rule will apply. See *Hughs v. Clarksville, 6 Pet. 369.*

The clause in the contract stipulating what the relation of the parties should be after forfeiture, created no new rights, and the notice to quit is not in this case waived. See *8 Mich. 312.*

CAMPBELL J.

Plaintiff brought summary proceedings to obtain possession of land against the defendant, who had originally entered under an executory contract, for a price payable in several instalments, the last of which fell due in November, 1855, but none of which was ever paid. It was stipulated that on any failure to pay, the plaintiff might forfeit the

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contract, and that after any such failure defendant should consider himself a tenant at will. Three or four years after the last default, defendant, who had previously made promises, said that plaintiff had no title, and that he had bought all the title he wanted from another person, from whom it is found he obtained a deed, giving back a mortgage. Afterwards, in 1861, plaintiff tendered him a deed, and demanded performance of the contract, but defendant refused, claiming plaintiff had no title. In 1866, plaintiff brought proceedings under the Forcible Entry and Detainer Act, and was defeated for want of notice to quit. He then commenced the present proceedings, and was defeated in the court below for the same reason.

It is quite needless to discuss the question whether any notice to quit was necessary to determine defendant's tenancy, after he had denied plaintiff's title and set up an adverse claim. In an action of ejectment, such a question might become pertinent; but the statute giving a summary remedy against tenants at will or by sufferance, whose estate has been determined, only allows it where such determination has been *by a notice to quit.—2 Comp. L. § 4985, subdivision 4.*

This statute cannot be enlarged; and as this tenancy was not thus determined, the plaintiff must fail in the present proceeding. The judgment below was correct, and must be affirmed, with costs.

The other Justices concurred.

Ethan H. Rice et al. v. Spencer S. Benedict.

Report of Referees: Effect of being entirely set aside: New trial. A Referee's report entirely set aside, leaves the cause as though it had never been tried, and there is left neither evidence nor finding on which the Court can act; but the issue of fact requires a new trial before any judgment can be given.

Heard January 5th. Decided January 11th.

Error to Jackson Circuit.

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RICE v. BENEDICT.

This was an action of debt founded upon a judgment. The case was referred to referees who filed their report. The case was submitted to the court on exceptions, filed by defendant in error. The exceptions were sustained, the report was set aside, and a judgment rendered for plaintiff below.

Johnson & Higby, for plaintiff in error.

Livermore & Wood, for defendant in error.

Per Curiam.

In this case, the suit having been referred under the statute, and the report of the referees having been excepted to, the Circuit Court instead of confirming it in whole or in part, set it aside altogether, and then without any further trial or reference back, gave judgment for plaintiffs for $646.32 damages, with costs.

This was unauthorized by law. As soon as the report was set aside, the case stood in the same predicament as if the verdict of a jury had been vacated, and until a new trial should be had before the Court or a jury or referees, there was nothing left to act upon. A report set aside leaves the cause as if it had never been tried, and there is left neither evidence nor finding; but merely an issue of fact requiring trial before any judgment can be given. Until some competent body has re-tried that issue, the court cannot have any basis for determining which party should prevail, or what amount, if any, was due from one to the other. Every judgment must be based upon some finding, and here there is none whatever remaining in force. The judgment must be reversed, and the cause be remanded for a new trial.

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Franklin Moore v. David B. Ellis.

Waiver of jurisdictional defect. Want of jurisdiction in a Court over the subject matter of a suit, can never be waived by the parties.

Appeal: Waiver: Jurisdiction. Where a party against whom a decree was made in chancery, undertook to appeal therefrom, but failed to perfect his appeal within the time limited by law, it was held that no laches of the opposite party in moving to dismiss could preclude his right to have the case dismissed on that ground.—*2 Comp. Laws, § 3,597.*

Heard and decided January 7th.

Appeal in Chancery, from Washtenaw Circuit.

This was a motion to dismiss the appeal in said cause, for want of prosecution.

The appeal was taken June 13, 1865. The usual bond was filed on the 10th day of August following, and a transcript of the record was filed in this court on the 6th day of October, 1868.

L. T. Griffin, for the motion.

A. Felch, contra.

The Court held that, as the bond was not filed within the forty days required by the statute.—*Comp. Laws, § 3,597* it becomes a jurisdictional fact, and confers no jurisdiction upon this Court, and that no laches upon the part of defendant in bringing on the motion can confer such jurisdiction.

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APRIL TERM, 1869, AT DETROIT.

James Pearsons v. Caleb Eaton.

Replevin: Non-suit: Assessment of value of property: Jury. Where a defendant in Replevin recovers judgment by nonsuit, or discontinuance, and elects to take judgment for the value of the property taken, and subsequently under a notice of trial, has the *value* of such property assessed by the court without a jury.

Held, competent (*Sess. Laws, 1865, p. 325*). The intervention of a jury is required only where *damages* are sought to be assessed.—*2 Comp. L. 5037.*

Writ of Error: What acts of Circuit Court reviewable. The only decisions of a Circuit Court in civil cases which are reviewable upon Writ of Error, are such as arise upon the record, or such as are made the ground of exceptions upon the trial, and become a part of the record by Bill of Exceptions.

There is no jurisdiction in this court to review all acts of a Circuit Court. Some things are entirely matters of discretion; and those which do not rest in discretion, but yet form no part of the regular record, can only be reached by some other form of writ, and not by writ of error.

Heard January 8th. Decided April 13th.

Error to Washtenaw Circuit.

This was an action of Replevin to recover the possession of certain personal property.

After filing a declaration in the cause, and after several continuances and notices of trial, the plaintiff below entered the default of defendant for want of a plea, and subsequently moved to strike the case from the docket for the same reason.

The Court below ruled that both parties having treated the cause as at issue, it was too late for the plaintiff to deny the fact.

Subsequently, on motion of defendant's counsel, it was ordered that the plea of the general issue be filed *nunc pro tunc* (the files having been lost).

The case was thereupon noticed for trial. The plaintiff was duly called and nonsuited, and the defendant having waived a judgment for the return of the property, took judgment for the value thereof, and his costs to be taxed.

On motion of plaintiffs counsel, ten days were given to move to set aside the non-suit, or settle a bill of exceptions.

The judgment was afterwards vacated on payment by plaintiff of defendant's costs, to be taxed.

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Subsequently, on motion of defendant, it appearing that said costs had not been paid, the order vacating said judgment of non-suit was set aside.

Norris & Uhl, for plaintiff in error.

Joslin & Blodgett, for defendant in error.

GRAVES J.

Error is assigned in this case upon four grounds, namely:

First: That the Court made an order on the 20th of January, 1868, reciting the loss of the files, and allowing the plea of the general issue to be filed on the exparte motion of the defendant in error.

Second: In giving judgment of non-suit when default for want of a plea had been theretofore regularly taken of record, and never opened or set aside, and when no plea had been legally filed or served.

Third: In the assessment of damages and,

Fourth: In vacating the order setting aside the judgment of non-suit and restoring that judgment.

The counsel for the plaintiff in error, in supporting the third assignment of error, contended that the judgment showed that the case was noticed for "trial" and not for assessment of damages, and then argued that the statute required the assessment of "damages" in actions of replevin to be made by a jury upon a notice of fourteen days.

The counsel inadvertently overlooked the statute applicable to this case, and under which the Court was acting in forming judgment.

It is true, that the judgment recites a notice of "trial," but it is equally true that no damages were assessed. The defendant in replevin elected to take judgment for the value of the property taken upon the writ, and it was the value of the property that was assessed, and not damages. This

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was fully authorized by § *5038 Comp. L.* as amended in 1865.—(*Sess. L. 1865, p. 325.*)

The other questions which were argued at the bar, we think are not properly before us upon this writ of error, and we therefore decline to discuss them.

In general there are questions in the progress of a cause in the Circuit Court, which from their nature, cannot be re-examined in any form, while there may be others reviewable here on writ of error, and others still properly re-examinable, but in some other manner. It may not be easy in every instance to distinguish between questions belonging to these different classes, but we are satisfied that those here presented cannot be reviewed in this way without disregarding the settled course of decision in the common law courts. We are therefore of opinion that as no error has been shown, the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

Isaac Marston v. Catharine Brashaw et al.

Conveyance: Certificate of Acknowledgment: Subscribing. The certificate of acknowledgment of a conveyance is not valid unless subscribed.—*2 Comp. L.* §2729.

A name written in the body of the certificate is not such a signature as the law requires.

Heard April 7th. Decided April 13th.

Error to Bay Circuit.

This was an action of ejectment to recover the possession of certain premises in Bay county.

The decision of the case turns upon the validity of a certain deed introduced in evidence by the plaintiff, and which was excluded by the court below for the reason that the officer who took the acknowledgment did not subscribe the same.

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A verdict was found for the defendant.

Isaac Marston, for plaintiff in error.

The record of a warranty deed from Terissa Matevia, to Louis B. Trombley, dated October 16, 1850, offered in evidence by plaintiff, was improperly rejected by the court.

The signature of an officer at the end of a certificate is not necessary, where his name appears in the body, and purports to be his act; and no showing or intimation is made that it was not his handwriting.—*Smart v. Howe, 3 Mich. 592.*

D. B. Duffield, and *Green & Scofield*, for defendants in error.

The record of what purported to be a deed from Terissa Matevia, was properly rejected by the court on both the grounds upon which its introduction in evidence was objected to. The certificate of acknowledgment was not signed; and there was no evidence of the execution of the deed or certificate.—*2 Comp. Laws, §§ 2720, 2727, 2732, 2742; 4 Mich. 565.*

CAMPBELL J.

Plaintiff brought ejectment, and, in order to show title, offered to introduce the record of a deed from one Terissa Matevia to Louis B. Trombley, and to show that the grantee went into possession, claiming title under it. He also proposed to deduce title to himself from this grantee by virtue of a series of mesne conveyances. The record of the first deed was excluded as invalid, and the subsequent conveyances were also ruled out for various reasons alleged, and plaintiff was therefore subjected to an adverse verdict.

The objection urged against the record of the original deed in the chain of title, was that it had no legal certificate of acknowledgment. The name of an acknowledging officer was inserted with a proper date in the certificate as

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having taken the acknowledgment, but he did not subscribe it, although his name appears as a subscribing witness. It is claimed by plaintiff that a certificate is lawfully signed, if the name is inserted in it by the proper officer, without any technical subscribing, on the same principle which made a signing good under some clauses of the Statute of Frauds, without a subscribing, where intended to serve as a complete execution of a written instrument.

We think the certificate of acknowledgment of a conveyance is not valid unless subscribed. We believe this to be the only safe rule on principle, and we regard it as clearly indicated by the words of the Recording Laws. It is a very common practice among conveyancers to insert the name as well as title of the acknowledging officer in the body of the certificate, and such certificates are very frequently prepared beforehand, so that he writes nothing but his signature. If his name were to be set at the head only, there could be no safeguard against additions to it, and under our laws, which make records *prima facie* evidence, the original could not always serve, or be found, to prevent frauds from being practiced with comparative impunity. And instead of being judicially informed that certificates have been commonly used without being subscribed, we know the general usage to have been the reverse. If such instances exist, they must in all probability have been the result of accident.

We are not left to any doubt on this subject by the laws themselves. Our statutes which provide for acknowledgment, relate as well to acknowledgments out of the State as to those taken here. The terms applicable to domestic and foreign acknowledgments are almost verbally identical. But the statute, when providing for acknowledgment in other states, declares that they shall not entitle conveyances to be recorded without a certificate by a proper clerk or other person, setting forth among other things that "the person whose name is subscribed to the certificate of ac-

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knowledgment was, at the date thereof, such officer as he is therein represented to be," and "that he believes the signature of such person *subscribed* thereto to be genuine."—*2 Comp. L.* § *2729*. This provision has existed in substance from a very early period, and the legislature evidently took it for granted that all acknowledgments would be thus subscribed. This is also in accordance with the popular understanding of the place of a signature. The few exceptions which have been recognized, have never recommended themselves to the judgment of the profession, and no unsubscribed signature has been allowed to stand as valid without satisfactory proof that the instrument was delivered by the signer as a binding act, and intended to be complete. There was never any general presumption of that kind, and should any such be now adopted it could only work mischief.

As the only claim attempted to be shown, was under this deed and a possession taken by virtue of it, the subsequent conveyance could be of no importance in the case, if this should be ruled out. We therefore do not deem it important to consider the questions which relate only to those, inasmuch as we think the court rightly excluded the first record.

The judgment should be affirmed, with costs, and the record remanded.

The other Justices concurred.

George Dixon v. the People.

Witness: Proof of marriage of defendant in criminal case. In a criminal prosecution the reputed wife of the defendant was called as a witness for the people, under objection, whereupon she testified, in substance, that she was married to the defendant in 1865, and lived with him as his wife; that she was previously married to one Phillips in 1859; that the last time she saw him was in 1860; that she had not heard from him since, but that she had seen a notice in 1863

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DIXON v. THE PEOPLE.

in the newspaper of the death of a person whom she supposed to be him, and that she informed said Dixon previous to her marriage to him of her relation to said Phillips, and of said death. The prosecution then offered slight evidence, tending to show that a person resembling said Phillips had been seen alive since the marriage to Dixon.

Held, That this evidence made a *prima facie* case of a valid marriage in good faith; since the presumption of innocence, that she would not willingly commit the crime of bigamy, by marrying Dixon while Phillips was alive, rendered it obligatory upon the Court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of the marriage with Dixon.

Held further, that after the prosecution had shown an actual marriage between the defendant and the witness, *prima facie* valid and in good faith, upon which the defendant might reasonably rely as valid, and upon which, on the trial, he did rely and claim as valid, it was not competent for the prosecution to introduce opposing testimony for the purpose of establishing in this collateral manner the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant. The marriage was not in issue, and the pleadings gave defendant no notice that such a question was to be tried, and he cannot be called upon thus suddenly and unexpectedly to meet the question.

Heard January 7th. Decided April 13th.

Error to Branch Circuit.

The plaintiff in error was tried and convicted in the court below for the murder of his son James Dixon.

On the trial, the prosecution offered as a witness one Henry S. Dean, who testified that he was a Justice of the Peace; that he knew Harriet Dixon—claimed to be the wife of defendant; that he married her in 1857 or 1858 to a man by the name of Phelps or Phillips; that he was a tall slim man with sharp features and black hair.

The prosecution then introduced Harriet Dixon as a witness; and asked her whether she was ever married by said Dean to any other person.

This was objected to, on the ground that she was the wife of defendant. The Court overruled the objection. Her testimony and the subsequent proceedings are stated at length in the opinion.

Shipman & Loveridge, for plaintiff in error.

1. Harriet Dixon was not a competent witness against her husband for any purpose whatever—not even to prove her former marriage.—*Laws of 1861, p. 169, sec. 4.*

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It was error in the court below to permit her to be examined as a general witness against him.

a. The rule of the Common Law excluding husband and wife from being witnesses for or against each other, is analogous to the rule between client and attorney. (*1 Greenl. Ev.* § *338.*) Yet, as to them, the actual relation need not exist. If the client acts under the belief that it exists, it is sufficient to exclude the communication. — *Smith v. Fell, 2 Curteis, 6, 67; Sargent v. Hampden, 38 Me. 581; McClellan v. Longfellow, 32 Id. 494.*

Why require the actual relation to exist between husband and wife?

b. On grounds of public policy, an acknowledged marriage, believed to be lawful by the parties, ought not to be disputed collaterally, nor in a proceeding where it is not put directly in issue — that an opportunity to produce all the evidence of the fact, may be had. — See *Campbell v. Twemlow, 1 Price, 81, 88, 89, 90; 1 Greenl. Ev.* § *339.*

At all events, Mrs. Dixon was incompetent so long as the legality of her last marriage was in controversy. — *1 Greenl. Ev.* § *339; Griggs' Case, T. Raym. 1; Scherpf v. Szadecky, 4 E. D. Smith, 110; Bull, N. P. 287.*

2. It was not proven that her former husband was living at the time of her last marriage.

The Phillips described by the witness Bailey, is as much like her former husband as any other "tall, slim man, with dark eyes," but no more so. — (*As to similarity of names, see Wickersham v. People, 1 Scam. 128; Hubback on Succession, 103, 465–5.*)

3. But it does appear that her former husband was dead at the time of her last marriage.

First: By presumption: Her last marriage was March 9, 1865, and it will not be presumed that the man she married December 30, 1859, and had neither seen nor heard of, since April, 1860, was then living. — *1 Greenl. Ev.* § *35; Mathews Presump. 29; Williams v. East Ind. Co. 3 East;*

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192; Rex v. Twing, 2 B. & Al. 386; Monroe v. Gardner, 1 Const. R. 328.

Second: By the newspaper report of his death. Hearsay is admissable to prove death.—*Jackson v. Boneham, 15 Johns. 226; Jackson v. Etz, 5 Cow. 314; Doe v. Griffin, 15 East, 293; Scott v. Ratcliff, 5 Peters, 81; Pegram v. Isabell, 2 H. & M. 193; Jackson v. King, 5 Cow. 237; Lewis v. Marshall, 5 Peters, 470; 2 Greenl. Ev.* § *478, a — 478 b; Cochrane v. Libby, 18 Maine, 39.*

It is as much in the "ordinary course of business" for newspapers to publish deaths as market reports, yet these are admissable.— *Sisson v. C. & T. R. R. Co. 14 Mich. 489; C. & T. R. R. Co. v. Perkins, 17 Id.; Jewell v. Jewell, 1 How. 219.*

It seems slight proof in this case would be sufficient.— *2 Greenl. Ev.* § *278, h.*

Dwight May, Atty. General, for the People.

1. At the trial, the people offered one Harriet Dixon as a witness, and certain preliminary questions were asked her, evidently for the purpose of showing that she was not the lawful wife of the respondent.

This was objected to, for the reason that she was his wife, and could not testify in the case without his consent — *Laws 1861,* § *4.*

(*a*). The objection begs the question, and assumes that to be *a fact* which was then in dispute.

(*b*). This, however, is of little consequence, because it subsequently turns out in proof, that the witness had, at the time of the pretended marriage with the respondent, a lawful husband (Phillips) then living.— *2 Comp. Laws,* § *3,208.*

The proof clearly shows this, and the court properly ruled that the witness was not the lawful wife of the respondent.

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(*c.*) If it was not for the court to decide *the fact*, it ruled that the witness was not the lawful wife of the respondent, and did right in submitting the question to the jury, under proper instructions.

CHRISTIANCY J.

Was Harriet Dixon — claimed by the defendant below to be his wife — properly admitted as a witness against him?

This is the main question in the case; and the defendant having objected to her introduction, on the ground that she was his wife, the question is to be decided on common law principles, the statute not affecting the case.

It appeared from the preliminary examination of the woman (which must be treated as an examination upon the *voir dire, 1 Greenl. Ev. 424*), that she had been married to one John or Jonathan Phillips, Dec. 30, 1859, at Green Oak, Livingston County, in this State; that he was a tall, slim man, with black hair, black eyes, and a moustache; that the last time she saw Phillips was the last of April, 1860; that she had not heard from him since; that she was married to this defendant at Coldwater, Branch County, in this State, March 9, 1865, by a Methodist minister; that in 1862 she read an account in a newspaper of the death of a man by the name of Phillips, whom she supposed to be her husband; that when she married the defendant she told him her husband (Phillips) was dead, and had been dead several years; and she had lived with the defendant as his wife about three years in Branch County, up to the time of his arrest in this case.

This evidence made a very clear and strong *prima facie* case of a valid marriage in good faith with the defendant; since, without reference to the newspaper report, the presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive — rendered it obligatory upon the court, in the absence of testimony to the contrary, conclusively to per-

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sume the death of Phillips and the validity of the marriage with the defendant. — *Rex v. Twyning, 2 B. & Al. 386; Williams v. East India Co. 3 East, 192; 1 Greenl. Ev. §§ 34, 35; Mathews Pres. Ev. 29.*

The only evidence offered to overcome this presumption was that of Dean, the justice who had married her to Phillips, and that of Bailey; Dean did not know whether the name was Phelps or Phillips; he had seen him but once; he was a tall, slim man, with sharp features and black hair. The substance of Bailey's testimony was, that some ten or twelve years before, he had known a man in Wayne County, Michigan, by the name of John or Jonathan Phillips; that his (P.'s) father and folks lived there, and he with them, and had no other home; that he travelled much, but he did not know of his living in any other county; that he was always called John; that witness knew him for some ten years up to the time witness removed from Wayne County, some six years before this trial (which must have been about 1862). He knew nothing of any marriage of this Phillips with this woman, and had never seen her with him; but this Phillips was a tall, slim man, with dark eyes, and a long nose, and that he (this Phillips) was alive and in Branch County about four years before this trial (or in 1864), and worked for witness some six weeks, and that he saw him again in the same county about two years before the trial (or in 1866).

This is all the evidence which could be claimed to have any possible tendency to show the identity of this Phillips with the former husband of this woman. And upon the hypothesis that it was competent to try the question of the validity of the defendant's marriage in this collateral manner under the particular circumstances of this case, did this evidence fairly tend to prove the identity of the former husband of this woman with the Phillips who was shown to have been alive in Branch County in 1864 and 1866, after the defendant's marriage? Dean married this woman

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to a man by the name of Phillips in 1859 at Green Oak, in Livingston county, but he had not seen him since. Bailey had formerly known a man by the name of John Phillips, in Wayne county, and had seen him in Branch county, alive, in 1864 and 1866; but whether this was the same Phillips to whom Dean referred, or who had been married to this woman he is entirely ignorant; he knows nothing of any such marriage or of their having lived together, or whether they had ever been recognized as husband and wife.

Neither Dean nor Bailey gives any specific or clearly distinctive mark by which either can know that the other refers to the same person to which he himself refers. Nor does either refer to any particular circumstance or transaction with which the Phillips he had known had been connected, which is known to or recognized by the other, so as to enable them to know that both are referring to the same person. There was, it is true, an identity of names (though Dean himself did not know whether the name was Phelps or Phillips, but the woman renders it certain that it was Phillips), and there is, so far as can be judged of by verbal description, a general resemblance in personal appearance. But Phillips is so common a name, that of itself it seems little better for identification than that of Smith or Jones. And the description of the personal appearance is so general, without any distinctive or specific mark or peculiarity, that it would probably fit equally well, at least one in every twenty or twenty-five men in the State.

Such merely verbal descriptions of such general features or resemblances, are in themselves of no weight, though they possibly might have some bearing as corroborative or impeaching evidence in case of a conflict between witnesses testifying to or against the identity, upon professed personal knowledge.

Without some very peculiar and distinguishing mark or feature, language is incapable of conveying to the mind of another so accurate a picture of a person the latter has not

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seen, as to enable him with reasonable certainty to recognize the original. And among the most intelligent men, two might entirely agree in a much more specific description than is here given of a third person; and yet upon attempting to verify the description by the original it might be found that the two are referring to different persons, who, when actually seen, will be found to bear but a slight resemblance, and not likely to be mistaken, the one for the other, by any one who has seen both.

There is also in the testimony in this case, some evidence having a slight tendency at least to disprove the identity. The testimony of Bailey tended to show that the Phillips to whom he referred, resided in Wayne county at the time of his marriage; while that of the wife tended to show that he did not reside in Wayne, but in Livingston. And when we consider that the identity, if it existed, must, from the nature of the case, have been easily shown by persons living in Wayne or Livingston county, or both; that no attempt is shown to have been made in this way, nor any reason shown why it was not done or attempted, instead of relying upon this inferior and more dubious kind of evidence; we think it was clearly the duty of the court to have excluded the evidence in question, as having no safe or legitimate tendency to establish the identity in question.

Upon this evidence however, the court seems to have assumed to determine that the marriage with the defendant was void, as he admitted the woman to testify against the defendant, notwithstanding his objection.

This might dispose of the case; but as there is to be a new trial, and the evidence of this woman may be again offered, we think it proper further to say, that after the prosecution had shown, as they did by this woman, upon the *voir dire* (for such, we think, was the effect of her preliminary examination), an actual marriage, between the defendant and the witness, *prima facie* valid and in good faith, upon which the defendant might reasonably and

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honestly rely, as valid, and which upon the trial he did rely upon and claim as valid; it was not, in our opinion, competent for the prosecution to introduce opposing testimony for the purpose of establishing, in this collateral manner, the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant.

The rule which excludes husband and wife from testifying against each other rests upon sound reasons of public policy, much broader than that of the mere interest of a witness. The object of the rule is to avoid occasion for domestic dissension and discord, to preserve inviolate that mutual confidence which is essential to the marriage relation, the peace of society, and the social welfare.

This confidence, therefore, should not be violated, nor the privilege it gives taken away without a fair trial of the validity of the marriage (when a marriage in fact *prima facie* valid and in good faith has been shown, as it is here).

Such a trial cannot be had when the marriage is not in issue, and the pleadings give the defendant no notice that such a question is to be tried, and he is suddenly and unexpectedly called upon to meet the question without a fair opportunity to produce his evidence.

It is easy to see how a defendant might be wrongfully deprived of his privilege and the confidence of the marriage relation be rudely violated by such a mode of trying the validity of his marriage. While he has no reason to anticipate such a question, the prosecution may arrange their plans and prepare their testimony before hand, and suddenly introduce upon the trial evidence, showing, for instance, that the defendant or his supposed wife has been previously married to another person who is still alive; while the truth may be that the former marriage was void by reason of the woman having a former husband living at the time of such marriage, or for some other cause, or a divorce may have been obtained by the woman, or by the defendant, perhaps in another state; but the defendant thus

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unexpectedly called upon, cannot produce his witnesses nor obtain the record of the divorce in time to avail him on the trial.

There is much difficulty in questions of this kind. It is not safe to lay down any universal rule. Every case must depend, in a great measure, upon its own peculiar facts and circumstances; and our decision must be understood with special reference to the facts of this case.

The judgment of the Circuit Court must be reversed and a new trial awarded.

COOLEY CH. J. and CAMPBELL J. concurred.

GRAVES J.

The evidence submitted on the question of the competency of the female witness in this case, established a marriage in fact between her and the defendant, contracted and adhered to in good faith, while there was not a scintilla of evidence tending to show that the defendant, or, indeed, the witness, had any suspicion from the time of the marriage until the arrest that the legality of the union was at all questionable. Since, therefore, the only difference between the relation of these parties and that which obtains in other cases where marriage is a peremptory disqualification consisted in the possible invalidity as matter of law of the marriage which the parties all along believed to be valid, I think that the reason of the rule which precludes their testifying for or against each other fairly applicable; and on this ground I assent to a reversal of the judgment.

Peter C. Andre v. Frank Fitzhugh et al.

Attachment suit: Discontinuance: Sureties on bond: Parties. **An attachment suit was commenced against three defendants. To prevent the removal of the property attached, the usual statutory bond was executed. On the trial, the plaintiff, under Rule 71, discontinued as to two of the defendants, and proceeded against the third, and obtained judgment.**

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ANDRE v. FITZHUGH ET AL.

In a suit subsequently commenced upon the bond, defendants objected to a recovery on the ground that the discontinuance as to the two defendants released the sureties on the bond.

Held, that the bond given by the sureties must be considered as tacitly referring to the suit as *then* constituted in respect to parties, and not as it might *afterwards* be modified by the plaintiff.

Such a change of parties, as made in this case, would not only transform the cause of action from a joint to an individual one, but would necessarily alter the operation of the contract of the sureties, and without their consent.

Heard April 6. Decided April 13.

Case made from Bay Circuit.

This was an action of debt brought by the plaintiff upon a certain bond executed by the defendants to the sheriff of said county, to prevent the removal of certain goods seized under attachment proceedings against William A. Cook, Charles M. Smith, and George H. Rozet.

The declaration set forth the attachment proceedings, the execution of the bond, and the judgment. The defendants pleaded the general issue, and gave notice that they should insist that the discontinuances as to two of the defendants operated as a discharge of the sureties, and that the property so attached, was the property of the defendants as to whom the suit was discontinued, and that Rozet had no interest in the property attached.

On the trial of the attachment suit, plaintiff discontinued as to two of the defendants in attachment, and obtained judgment for the whole amount, against the remaining defendant, Rozet.

In the suit on the bond, the defendants claimed that the discontinuance as to two of the defendants in attachment operated as a discharge of the sureties' liability.

They also offered to show that George H. Rozet had no interest in the property attached, but which the court refused.

On submission of the case, the court found for the plaintiff, and rendered a judgment for the full amount claimed upon the bond ($5,240 02).

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Wm. H. Sweet, for plaintiff.

1. The discontinuance as against Smith and Clark, and proceedings against Rozet alone, were authorized by Rule 70, *Circuit Court Rules*, and the correctness of such practice is confirmed by *7th Mich. 380; 9th Id. 3; Comp. Laws, § 3390; 3 Mich. 261; 9 Id. 529; 82 Eng. Com. Law, 851.*

2. Such discontinuance did not discharge the defendants from their liability under the bond. The obligation is to "pay any judgment which may be recovered by the said Peter C. Andre, in the suit commenced by the said writ of attachment," &c.

A judgment was recovered in said suit, and defendants are therefore bound by their obligation to pay such judgment.

3. It is no objection to the practice provided for by rule 70, that this rule of court was not in force when the attachment statute was enacted. The Supreme Court have ample power to make rules regulating the practice of the courts, and no rights are affected by the application of the rule in this case. The rule in question does not affect or change the attachment law; and neither by intendment nor implication can the discontinuance as against one or more defendants, be construed, under the laws, to take away the right a plaintiff may acquire as against the remaining defendants under the attachment.

Grier & Macdonald, for defendants.

1. The declaration alleges that the Sheriff, by virtue of said attachment, "seized certain property of the defendants in said writ named." The plea alleges the property to have been that of the parties against whom the action was discontinued. On the trial, defendants offered to prove that fact, but were not allowed to do so. To which they alleged exceptions.

The bond was conditioned for "the payment of any

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judgment which may be recovered by the plaintiff in the suit commenced by such attachment."

We claim that this was such an alteration or change in the action, that would have dissolved the attachment, had no bond been given, and which released the bond.

It is a general principle that after an attachment or holding to bail, the plaintiff cannot alter his writ to the injury of a subsequent attaching creditor, or bail.—*Willis v. Crooker, 1 Pick. 204; Putnam v. Hall, 3 Id. 445; Fairfield v. Baldwin, 12 Id. 388; Langly v. Adams, 40 Maine, 125; Moulton v. Chapin, 28 Id. 505; Peck v. Sill, 3 Conn. 158; Denny v. Ward, 3 Pick. 199; Donelson v. Andrews, 1 Id. 156; Clark v. Foxcroft, 7 Greenl. 348; Fairbanks v. Stanly, 7 Shep. 296; Clough v. Monroe, 34 N. H. 381; Bradhurst v. Erwin, 8 Ired. 495; Smith v. Shaw, 8 Id. 233.*

When it does not appear from the record that the amendments are for the same cause of action as the original declaration, the burden of proof rests upon the party seeking to establish that they are for the same cause of action.—*Austin v. Burlington, 34 Vt. 506.*

And such bonds, as the one given in this case, are in effect merely special bail, and governed by similar rules.—*Drake on Attachment, 312; Garrett v. Tinnin, 7 How. (Miss.) 465.*

Amending a declaration by adding a count upon a cause of action which could not be given in evidence upon the original declaration, or amending a defect existing at the time of entering bail, and which would have defeated the plaintiff's action, but for such amendment, will discharge the bail.—*Carrington v. Ford, 4 Cranch. C. Ct. 231; Hyer v. Smith, 3 Id. 437; Payen v. Hogson, 1 Id. 508; 1 Abbott's Nat. Dig. 79, 227.*

In an action of assumpsit, if another person be made a co-plaintiff or co-defendant by amendment of the writ, by leave of court, the attachment of property is thereby dissolved.—*Moulton v. Chapin, 28 Maine, 505; Fullerton v.*

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Campbell, 25 Penn. State R. 345; Denny v. Ward, 3 Pick. 199; Vincent v. People, 25 Ill. 500.

A debt due from all of the defendants jointly, has no identity with a debt due from one of them only, and a discontinuance, by leave of court, as to one of them is another suit, and discharges the attachment.—*Peck v. Sill, 3 Conn. 158.*

Discontinuing, as to the other defendants, was a material alteration in the contract of the obligors in the bond, into which they originally entered, and by which their liability was changed. They had a right to insist on the terms of their contract as originally made, and it was not competent for other parties, without their consent, to increase their liability. By so doing, they destroyed its validity.—*Langly v. Adams, 40 Maine, 125; Bean v. Parker, 17 Mass. 602.*

And it must be remembered that, until sued in this case, the defendants have had no day in court. They have never before had an opportunity to object to the discontinuance as to Smith and Cook. And it is against every principle of judicial action to allow such an amendment to be made without notice to the sureties.—*Montgomery v. Henry, 10 Mich. 19.*

The true meaning and effect of the condition of this bond, upon a just construction of the terms in which it is expressed, and in reference to the object and purpose for which it was made, is to bind the obligors to pay to the plaintiff whatever sum he should recover against the defendants in that action. No recovery has been had against them, and consequently the plaintiff can have no claim against the present defendants for the non-performance of their contract. They never took upon themselves any obligation to pay any judgment that might be rendered against any one of the defendants.—*Tucker v. White, 5 Allen, 322.*

These rules allowing the discontinuance as to defendants are in derogation of the common law, and should receive a strict construction in such cases as this.

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The defendants were not parties to the suit in which the amendment was made, and Smith and Cook were no longer parties, upon the amendment being made. Rozet was then the sole defendant, and by rule, the action proceeded as though commenced against him alone. And the effect of amendments must be confined to the parties to the suit.—*Emerson v. Upton, 9 Pick. 167; Wight v. Hale, 2 Cush. 492.*

The rule authorizing a plaintiff to discontinue against one or more defendants, was not designed to change any legal rights, but merely to enable a plaintiff who had sued more parties than he could recover against, to amend his case by declaring against his real debtors.—*Winslow v. Herrick, 9 Mich. 380.*

Now what were the legal rights of the obligors in this bond as secured by the statute under which it was given? The statute under which it was given, was enacted and became a law by the revision of the statutes in 1846. And those sections providing for the bond, have remained unchanged up to the present time. When this statute became a law, the Supreme Court had no power to make rules authorizing the discontinuing of cases as to one or more defendants, or the addition of new defendants; but that power was given by the Session Laws of 1851. The Supreme Court, in pursuance of that statute, in 1853 framed the rules which now exist on that subject.—*Revised Stat. of 1846, 415, 351; Session Laws of 1851, 109.*

Whatever would discharge the bond under the statute when it became a law, will have that effect now; there being no statute or rule of law providing to the contrary, or continuing the bond in force.

After the discontinuing as to Smith and Cook, it was no longer the same case. If it was the same case within the meaning of the statute, because the discontinuance was authorized by the rules of court, then had the plaintiff brought in new defendants, it would still have been the

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same case, for that course is equally authorized by the rules, and the obligors in the bond would be bound to pay any judgment rendered therein, in favor of the plaintiff. Such a result would be rank injustice; but if plaintiff's view of the law is correct, the conclusion is inevitable.

GRAVES J.

In 1865, the plaintiff commenced a suit by attachment in the Circuit Court for the county of Bay, against William A. Cook, Charles M. Smith and George H. Rozet; and the sheriff levied the writ upon a large amount of personal property in the hands of one Charles Orton. In order to prevent the removal of such property, Orton caused to be executed and delivered to the sheriff, a bond as prescribed by the statute, *Comp. Laws*, §§*4754*, *4755*, with the condition, that if the obligors should well and truly pay any judgment which might be recovered by the said Peter C. Andre, in the suit commenced by the writ of attachment, within sixty days after the judgment should be recovered, that then the obligation should be void, but otherwise of force. The present defendants were the makers of that bond. Upon the trial of the suit commenced by the attachment, the plaintiff, by permission of the court, under rule seventy-one of the Circuit Court, discontinued as to the defendants William A. Cook and Charles M. Smith, and proceeded against the defendant Rozet, against whom he recovered judgment for $4,692 61 damages, and $45.32, costs.

The bond given to the sheriff was subsequently assigned to the plaintiff by whom this suit was brought against the present defendants as makers of that bond, and the breach relied on consisted in the non-payment of the judgment in attachment against Rozet alone. In this action upon the bond, the defendants took the position that the discontinuance by the plaintiff, as to the two defendants, Cook and Smith, discharged the makers of the bond from their lia-

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bility, or at all events precluded the plaintiff from charging them beyond the value of the interest of Rozet in the property released.

The court below being of opinion however, that the statute gave the plaintiff the right to demand judgment upon the bond for the full value of the attached property, notwithstanding the discontinuance as to Cook and Smith, and without regard to the value of Rozet's interest in that property, refused permission to the defendants to show that Rozet was not the owner of any of the attached property, and awarded judgment against the defendants for the whole amount of the judgment in the attachment suit, with interest.

That the statute under which the bond was given, if applied according to the literal import of the language, may be thought to support the view taken by the Circuit Court is very probable, but we think that a just interpretation of that statute must necessitate a different result.

We are led to this conclusion, by considering the object of the statute, the nature of the contract evidenced by the bond, and its connection with the proceeding to which it belongs, and also the serious consequences which a contrary judgment would allow, and which therefore we are not to suppose the legislature intended.

The bond to be given by the defendant or person found in possession of the goods is to be executed by sureties. When executed, it must be considered as tacitly referring to the suit as then constituted in respect to parties, and not as it should possibly be thereafter constituted at the instance of the plaintiff to avoid defeat. The sureties, on entering into the contract, measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter in case of defeat to respond to the plaintiff or the sureties themselves, if called on. As the writ only issues against the particular defendants, after a showing upon oath by the plaintiff or some one in his behalf, that the defendants named

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are indebted to him, it cannot be presumed that the sureties suppose themselves to engage to abide a discontinuance by such plaintiff as to part of the defendants, and still remain liable.

Any such change of parties, however, as that made by the plaintiff in this case, would not only transform the prosecuted cause of action from a joint to an individual one, but would necessarily alter the operation of the contract of the sureties, and without their consent.

It would allow the plaintiff to recover, when, but for the discontinuance, he would be defeated; and, therefore, upon the theory of the plaintiff, would fix a liability upon the sureties which could not otherwise exist.

It would also have the effect to compel the sureties to look for indemnity to such defendant, or defendants, as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond; and it might well happen that in the responsibility of the latter, the sureties would know themselves to be safe, while in that of the former they would know themselves to be without remedy.

It is believed that these considerations are sufficient to show that the construction contended for by the plaintiff is untenable, and that the judgment of the Circuit Court ought not to be supported.

The judgment must be reversed, with the costs of both courts.

The other Justices concurred.

The People ex rel. Board of Supervisors of Cass County v. The Townships of Porter and Calvin.

County bond: Liability of townships. The County of Cass, for the purpose of aiding enlistments under the President's Proclamation, adopted resolutions providing for the issuing of bonds, and that each town might, if it saw fit receive a number of them equal to its quota of men, and make its own distribu-

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THE PEOPLE v. THE TOWNSHIPS OF PORTER AND CALVIN.

tion; and that if any town failed in raising its quota, it should retain the bonds and apply them on its proportion of county taxes when redeemable.

In accordance with said resolution, the various towns received said bonds according to their quota. Subsequently, the Legislature legalized the action of the several local bodies, and provided that whenever county bonds had been loaned to any township the amount of such bonds should be assessed upon such town receiving the same, &c.

Held, that said bonds must be considered not as created for county purposes, but as lent to the various townships so receiving them, and they were severally bound to raise the money to pay them in full by assessment, without reference to the proportion which the assessable property in the town bears to that of the whole county; and that though the county was responsible to the holders, yet, as between the county and town, the latter were the principal debtors, and the former only surety.

Held further, that any money paid by the county for principal or interest, being money lawfully paid for the use of the towns, entitled the county to interest thereon from the date of its payment.

Heard April 10th. Decided April 13th.

Mandamus to the supervisors of the townships of Porter and Calvin, in Cass County, to levy a tax for certain county bonds received by them.

In December, 1863, the supervisors of Cass County passed the following resolutions:

"WHEREAS, By the late proclamation of the President of the United States, a call has been made for 300,000 men for the military service of the United States, to be furnished by volunteering, and in case any deficiency shall exist in the quota assigned to any State, then such deficiency shall be made up by draft, to commence on the 5th day of January, A. D. 1864; and, *whereas*, it becomes a loyal people to cheerfully respond to such call of the President; and, *whereas*, the offering of county and local bounties, in addition to such bounties as are already offered by the Government, may tend to fill up the quotas of the several districts and States, and thereby sustain and uphold the Government; now, therefore, be it resolved by the Board of Supervisors of Cass County, in special session assembled, that for the purpose of carrying out the object above mentioned, it is expedient to offer a county bounty of one hundred and fifty dollars, and such bounty is hereby offered, to be paid to each volunteer who shall so enlist into the military service of the United States, under said call of the President of the United States, and who shall be accredited upon the quota of any sub-district in said County of Cass, and to each man who shall be drafted to fill said quota, and who shall actually go into said service, either by himself or his accepted substitute, and that said bounty of one hundred and fifty dollars shall be paid in the manner and form hereinafter set forth:

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2d. And be it further resolved, that said bounty shall be paid in the manner and form following, that is to say; bonds of the County of Cass in the sum of one hundred and fifty dollars each, with interest coupons attached, and issued by the Treasurer of Cass County, and countersigned by the chairman of the Board of Supervisors, and registered and sealed by the County Clerk, with the seal of the Circuit Court of said county, and a record thereof kept by said clerk, showing the date of issue of the same, and the township to whose order the same is payable, which said bonds shall be payable in five years, and redeemable at any time within five years from the date thereof, at the pleasure of said County of Cass, and redeemable as hereinafter mentioned and provided, and which said bonds shall draw interest at the rate of six per cent. per annum, and payable annually. Said bonds shall be dated on the first or fifteenth day of the month following the actual time of issue.

3d. And be it further resolved, that the County Treasurer be and he is hereby authorized and instructed to deliver to each township, upon the presentation of an order signed by the township board, as many of said bonds as shall equal the number of men required to be furnished by the township, under the call of the President hereinbefore mentioned. Said bonds to be used by the several townships for the purpose of encouraging enlistments, in any way the townships, township boards, or township committees may direct.

4th. And be it further resolved, that in case any township shall fail to fill its quota in the manner and by the time contemplated by the foregoing resolutions, said township shall have the right to hold any remainder of county bounty bonds in its possession, until said bonds are called in for redemption, at which time said bonds shall be received by the County Treasurer in part payment of the county taxes charged to said township.

RESOLVED, That the Treasurer of Cass County be, and he is hereby directed, to fill the blank in the fourth and fifth lines of the bonds to be issued as an enlistment bounty by the County of Cass, so as to make them payable to the several townships or bearer.

On the 7th day of January, A. D. 1864, the Treasurer of the County of Cass delivered to the township of Porter twenty-eight bounty bonds, payable to said township or bearer, and on the same day twenty-two bounty bonds to the township of Calvin, payable to the township of Calvin or bearer. An entry of the facts, with the number of the bonds and their date, was made by the county clerk.

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These bonds were payable in five years, or sooner, at the option of the county, and drew six per cent. interest.

The other towns received their share of the bonds that year. The interest on these bonds, down to 1867, was paid by the towns, each paying the interest on the bonds it took.

In 1866 the board directed each town to raise by tax the amount of the bonds taken by it, and interest to the 1st of February, 1867, that said bonds might be paid.

Eleven towns obeyed, and paid their bonds. Three did not — Calvin, Porter and Newberg — and the county paid the interest on their bonds out of its general fund.

In October, 1867, the board apportioned to each of these towns a sum, as a county tax, sufficient to pay its bonds, interest due February 1st, 1868, and back interest paid by the county. Newberg paid up. Calvin and Porter did not, and the county paid the interest on their bonds out of its general fund.

At its October session, in 1868, the board again apportioned to each of said towns of Porter and Calvin the sum required to pay the bonds taken by each, interest to February 1st, 1869, and back interest; said sums being apportioned as a part of the county tax.

The supervisors of Porter and Calvin townships failed to levy the same.

On the 5th day of February, 1864, the Legislature passed an act for the purpose, among other things, of legalizing the acts of municipalities of this State in issuing bounty bonds, and providing for their payment by a tax, and in the case of counties, by a tax upon the property of the county, or upon the property of the townships loaning or using said bonds. — *Laws of 1864, p. 54.*

D. Blackman, for relators.

H. H. Riley, for respondents.

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THE PEOPLE v. THE TOWNSHIPS OF PORTER AND CALVIN.

CAMPBELL J.

These are applications for writs of *mandamus* to compel certain towns in Cass County to levy such sums as are required to pay principal and interest on certain county bonds alleged to have been lent to the towns upon the condition, afterwards sanctioned by the legislature, that the towns should have the amount apportioned to them as their share of county taxes. The claim made by the respondents, is that all these bonds were properly in fact, as well as in form, merely county obligations, and that the money to pay them should be apportioned upon the property of the entire county by its valuation, instead of being a town charge to the extent of bonds borrowed by or given to each town. The origin of the transaction was as follows:

In November, 1863, the Supervisors of Cass County passed resolutions, proposing to give a county premium or bounty on enlistments, of a bond of one hundred and fifty dollars per man, and appointed how the distribution should be made. In December, before any action had been had, they rescinded such of the resolutions as provided for direct action of the county authorities in paying the bounties, and in lieu thereof adopted another series of resolutions, providing that each town might, if it saw fit, receive a number of bonds, equal to its quota of men, and make its own distribution. These resolutions further declared that, although it should fail in raising its quota, each town should nevertheless retain the bonds and apply them on its proportion of county taxes, when redeemable.

In February, 1864, the action of the several local bodies incurring these obligations was legalized, and it was among other things enacted, that, "whenever the faith of any county has been pledged, and bonds issued and loaned by such county to any township, ward, supervisor district, or city therein, the amount of bonds so taken, with interest, as provided therein, shall be assessed upon the township,

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ward, supervisor district, or city, taking the same, and shall be collected and paid at the same time and in the same manner as other county taxes are collected and paid."—*L. 1864, p. 54.*

It is claimed by the respondents, that these bonds were not lent to the towns, but that the town officers merely acted as county agents in disbursing the bounties offered on behalf of the county. In this connection much stress is laid upon the first resolution, which declares in so many words that it is expedient to offer a county bounty of one hundred and fifty dollars per man. The original plan provided for carrying out this general resolution was purely one for county purposes, and did not leave the control in the townships. And, had the original plan been carried out, there could have been no doubt on the subject. But the whole plan of distribution, on which the first resolution is silent, was changed. The bonds were only to be delivered to each township when demanded by its own board. They were to be used in such way as each town might direct for itself. If not used, they were nevertheless to be retained by the towns; and, instead of being returned for cancellation, were to be applied as cash upon their quota of county taxes.

Under these circumstances we can have no difficulty in holding that they were lent to the towns, and assessable upon them. The object of the statute is plain that the county should not be compelled to provide from its own means for payment, but that the towns should raise the money to pay them. A failure of the towns could not in law exempt the county from paying the holders; but, as between themselves, the town was the principal debtor, and the county only bound as surety.

This being so, it follows that any money paid by the county for principal, or upon the interest due upon that principal, was money paid to the use of the town. Where such a transaction is authorized, we can see no good reason why the same rule should not apply which entitles individ-

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uals paying money to the use of others to recover interest on such payments. It is in no sense compound interest, for the debt created in favor of the creditor is the sum which he paid to the debtors use, and it can make no difference whether this sum was a liability of one form or another. The creditor recovers back the money which he paid, with interest upon it, because, as to him, it is so much money lent to the one whose debt he has paid. And interest runs from the time of such payment.

These considerations will enable the parties to ascertain the proper amounts to be raised, by a simple calculation. It only remains to be considered whether we shall issue a a *mandamus* to compel action by the towns.

It was admitted on the hearing that there had been no bad faith in the neglect to raise the money, but that the difference of opinion had been honest, and that our decision would be submitted to without a writ. Technically the writ cannot issue precisely as prayed, inasmuch as the roll for 1868 has run out. The law, however, seems to contemplate that a special roll may be made for the collection of these taxes. But we have thought it best, under all the circumstances, not to require this unusual step to be taken, but to leave the matter to be provided for in the taxes of 1869. We shall, therefore, suspend action on the writ at present, without costs to either party, leaving the proceedings open, and not dismissing them.

The other Justices concurred.

John Youell v. Henry Allen et al.

Specific performance: Correction of mistake: Entire contract: Severance. If a material error in a written contract for the conveyance of lands can be corrected on parol evidence, in a suit for the specific performance of the contract, and performance decreed according to the understanding as found upon such evidence, it should only be done where the mistake is clearly made out beyond cavil.

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YOUELL v. ALLEN ET AL.

Where complainant contracted for the exchange of a parcel of land owned by him, for two parcels owned by two different persons, and filed his bill for specific performance, alleging that one of the parcels to be conveyed to him was incorrectly described in the contract by mistake, and it appeared that such parcel had been sold to a purchaser not shown to have been aware of the mistake. *Held*,

1. That, assuming the proof of the mistake to be clear, there could be no relief as against such purchaser.

2. That, as the contract of exchange was entire, and not capable of severance, there could be no relief against the owner of the other parcel.

Heard January 11th. Decided April 13th.

Appeal in Chancery from Kent Circuit.

This was a bill to enforce the specific performance of a certain contract for the exchange of land. The bill was heard in the court below on pleadings and proofs, and dismissed.

The facts are stated in the opinion.

L. Patterson, and *Moore & Griffin*, for complainants.

Jno. T. Holmes, *E. Smith Jr.* and *G. V. N Lothrop*, for defendant.

COOLEY CH. J.

The complainant files his bill to enforce the specific performance of a contract by which Allen agreed to convey to him a parcel of land, and Franklin Tooley, a certain other parcel, in exchange for hotel premises owned by complainant, and then occupied by one Granger. The contract was in writing, and the land to be conveyed by Franklin Tooley was therein described as the south west quarter of section fifteen, in township six north of range eleven west, excepting therefrom 60 acres previously sold off from the west side; but the complainant avers in his bill, that the true description was the south east quarter of said section, except, &c.; the word *west* being written in the contract instead of *east* by the mistake of the person drafting it; and the complainant asks that for the purposes of this suit the contract may be treated as if it read as it was intended

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to read, and that he may have specific performance thereof with the mistake corrected.

Noah Tooley is made party defendant as a subsequent grantee of the premises which complainant alleges were to be, and should have been included in the contract, and he is charged in the bill with having received a deed of the premises with knowledge of the contract and in fraud of complainant's right. This charge is denied by answer.

The question whether a material error in a written contract for the conveyance of lands can be corrected on parol evidence, in a suit for the specific performance of the contract, and performance decreed according to the understanding as found upon such evidence, is one of no little difficulty, and upon which the authorities are irreconcilably at variance. If it can be, the evidence of the mistake upon which the court should give relief ought to be so clear as to establish that fact beyond cavil. No such clear evidence appears in this case, but, if we find the mistake at all, it must be upon inferences which are not of a very satisfactory character.

If, however, the mistake were clearly established as against Franklin Tooley, the complainant must still fail, because there is no evidence in the case which brings home to the defendant Noah Tooley a knowledge of such a contract as is set out in the bill. As to him, the contract is neither admitted nor proved; and as the exchange of complainant's place for the two farms was one entire contract, and not capable of severance, it is impossible that he should have relief. Without, therefore, investigating the various other objections which are made to the relief sought, a decree must be entered affirming the dismissal of the bill with costs.

The other Justices concurred.

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In the Matter of the Appeal of Merchant H. Goodrich, Administrator of the Estate of Harrison W. Goodrich, v. Joshua G. Leland, Administrator of the Estate of Chauncey S. Goodrich, Jr.

Partnership: Mortgage: Individual liability: Statute of Limitations. Harrison W. and Chauncey S. Goodrich, Jr., in September, 1852, borrowed money of one Fasquelle, and gave him a note or contract under seal for the payment of the same, and which fell due in September, 1865.

The said note was secured by a mortgage of same date, executed by Goodrich, Sr. and wife, to secure the payment of the same.

Goodrich, Jr., died previous to May, 1862; Harrison W. died in 1864; Goodrich, Sr., died in the life-time of Chauncey S., Jr. and devised to him the premises mortgaged, to secure the said debt.

The mortgage was foreclosed, and the premises sold September 10, 1860, for $1,242 75; May 10, 1862, the administrator of said Chauncey S., Jr. redeemed the premises by paying the amount due. Subsequently he presented his claim for one half of the said amount against the estate of said Harrison W. for contribution, and which was allowed by the commissioners.

On the trial of the appeal, the administrator of the estate of said Harrison W., offered to show that said Harrison W. and Chauncey S., Jr. were partners with one Cornelius D., at the date of said note; that said money was borrowed with the knowledge and consent of the partnership, and used for partnership purposes; that said partnership was unsettled and debts due. This was refused, and a verdict rendered for the amount of the claim.

Held, that Goodrich, Sr., must be regarded as having executed the mortgage at the request of Harrison and Chauncey Goodrich, Jr., to secure their debt, of which the note was evidence. Had he been living at the time of the redemption and had paid the mortgage, he could have sued them for money paid for their benefit, and Chauncey S., Jr. being the devisee of the mortgaged premises stood in the right of the devisor, and was entitled to recover for the half of the redemption money paid by him as for so much money paid for the use of Harrison W. Goodrich or his estate.

Held further, that the action was not barred by the statute.

The action arose from the time of redemption, and not from the time when the original creditor's right of action accrued against the debtors, on the note.

Held further, that the note being under seal, an action of debt could have been brought upon it at the time the claim was allowed.

In the absence of any proof that the condition of the estate did not warrant the administrator to redeem, the court will presume that, in redeeming, he acted in the proper discharge of his duty.

Heard April 6th. Decided April 13th.

Error to Washtenaw Circuit.

This was an appeal by Merchant M. Goodrich, executor of H. W. Goodrich, deceased, from the decision of commissioners allowing a claim in favor of the administrator of C. W. Goodrich, Jr. deceased.

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GOODRICH v. LELAND.

It appeared that Harrison W. Goodrich and Chauncey S. Goodrich, Jr. September 11th, 1862, borrowed thirteen hundred dollars of John Lewis Fasquelle, for which they gave a note or contract, under seal, for the payment of said sum and interest, by instalments; the last of which fell due September 11th, 1865. This note or contract is also executed by Chauncey S. Goodrich, Sr. and his wife; but it is therein expressly declared that the two latter named persons sign merely to give their assent to certain stipulations, and the release therein referred to (in reference to entry of judgment, and release of errors), and not to be liable to the payment of said Fasquelle. This note, or contract, also refers to a mortgage of the same date, executed by said Chauncey S. Goodrich and wife, to secure the payment of the note or agreement. And they (Chauncey S. Goodrich, Sr. and wife) execute to said Fasquelle a mortgage upon the lands of said Chauncey S. Sr. to secure the same note or contract. Chauncey S. Goodrich, Jr., one of the real makers of the note or contract died sometime previous to May, 1862, (the exact date the case does not show.) Harrison W. Goodrich, the other real maker of the note (and with Chauncey S. Jr. personally liable for its payment,) died September 10, 1864. Chauncey S. Goodrich, Sr. the mortgagor, died in the lifetime of Chauncey S. Jr. and devised to the latter the mortgaged premises, which was then subject to a part of the debt secured by it.

The mortgage, by assignment, came to the hands of Sarah H. Goodrich, who foreclosed it, and sold the mortgaged premises, September 10, 1860, for $1.242 75.

On the 10th day of May, 1862, the administrator of Chauncey S. Goodrich, Jr., (the devisee of the mortgaged premises) redeemed the mortgaged premises by paying the account due, to the assignee. And for one-half of the sum thus paid the administrator presented his claim against the estate of Harrison W. Goodrich, (who, with him was one of the persons originally and personally liable for the

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amounts) for contribution, and this claim was allowed by the commissioners to the amount of $726 63.

On the trial at the circuit, on appeal from this allowance by the commissioners, the administrator of Harrison W. Goodrich, deceased, offered to show that the deceased and Chauncey S. Goodrich, the real parties to the note or contract, were, at its date, co-partners in trade with one Cornelius D. Goodrich; that the money obtained on the note or contract was borrowed with the full knowledge and consent of all the partners, and was used in the partnership business; that the partnership business was yet unsettled, and that there were outstanding debts against the firm not yet paid.

This offer was rejected by the court. He then requested the court to charge the jury:

1st. That the appellee (the claimant) could not recover upon the facts in evidence, and the law applicable thereto.

2d. That the payment made in discharge of the mortgage read in evidence, collateral to the note on which contribution is claimed, is not such payment as entitles the appellee to contribution on the notes.

3d. That the claim is barred by the Statute of Limitations, if the jury believe that the payments (admitted by the claimant to be endorsed upon the mortgage, but not otherwise proved) were endorsed on the mortgage only.

4th. That the voluntary payment by Leland, the administrator of the estate of Chauncey S. Goodrich, deceased (one of the original debtors), there being no legal obligation upon said Leland or the estate he represented to pay said note, is not such payment as would entitle him or the estate to the contribution claimed.

All which requests were refused. The jury found a verdict for the claimant for $894 15, upon which judgment was rendered in the Circuit Court, and the case is removed to this court by the administrators of the estate of Harrison W. Goodrich, by bill of exceptions and writ of error.

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Norris & Uhl, for plaintiffs in error.

1. It was error in the court to exclude the following offered testimony.

a. That Harrison W. Goodrich and Chauncey S. Goodrich, Jr., two of the makers and the only real makers of the note, were at the date of the note, co-partners in trade with one Cornelius D. Goodrich — that the money obtained by and on this note, was borrowed with full knowledge and consent of all the partners, and was used in the partnership business.

b. That the business of such co-partnership was yet unsettled—at the date of the trial.

c. That there were outstanding and unpaid debts yet due by said co-partnership.

Its effect was not to contradict or vary by parol the terms of a written instrument.

It admits the contract or borrowing, and only seeks to show that in the present relations of the estates of the deceased makers, it would be illegal and inequitable, (and in these and other cases Probate Courts have a species of equitable jurisdiction—*People v. Wayne Cir. Judge, 11 Mich. 393*) to call upon one of the maker's estate for any of it — and in any event for only one-third of it, if such should prove to be the relative interest of the several partners and their estates.

This testimony tended to show that H. C. Jr. and C. were in business together. That H. and C. Jr. borrowed money for the firm and used it for the firm, with the knowledge and consent of all, — (the giving of a note is of no consequence as between these two makers.) Two of the partners die. The partnership matters are unsettled. Its debts are due, and before the partnership affairs are closed and the outstanding debts paid, one partner's estate calls upon the estate of another (in a suit upon this single transaction) to pay one-half and interest, of this borrowed

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money, that he has voluntarily paid to protect his private estate.—*Fernald v. Danby, 26 Me. 470; Grafton Bank v. Kent, 4 N. H. 221; 21 Pick. 195; 10 Shep. 156; Tucker v. Peasely, 36 N. H.*

2. The court should have charged the jury that the appellee cannot recover upon the law and the facts. The bill of exceptions gives all the testimony.

a. There was no formal issue in the case; none ordered by the court and none made; no declaration filed, and consequently no plea filed.—*Comp. L. § 2940.*

b. There were no sufficient proofs made by the claimant below.

c. Contribution will not lie, between partners, no settlement having been had, etc.—*1 Pars. Cont. 34; Murray v. Bogert, 14 Johns. 318.*

3. The payment was made by Leland, administrator, without authority of the Probate Court. The note was never presented or proved against the estate of C. S. G. Jr. (the mortgage he never made); at least there is no evidence of such proof or presentment.

The note was not paid in the lifetime of C. S. G. Jr. There is no proof of the payment of the note at all. There was a mortgage given by other parties, collateral to the note, and this mortgaged land Leland "redeemed * * from the sale" by paying the amount due (after the statute had barred an action upon the note) to the assignee of the mortgage, to protect property that his intestate took by will, subject to the mortgage. Had the administrator authority, by virtue of his office, to so apply the funds of the estate? By this payment wherein has he paid the note or any part of it?—*8 Mich. 34.*

4. The court was asked to charge the jury that the claim of the appellee was barred by the statute of limitations.

a. The note was due on the 11th day of September, 1855, and the statute then began to run. No payments were endorsed or proved to have been made on the note.

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The statute will run against this note (or contract) in six years. Also, see allowances made in the matter of estates.—*Sigler v. Platt, 16 Mich. 210; Comp. L. § 5370.*

b. The commissioners allowed the claim appealed from, against the estate of Harrison W. Goodrich, on the 24th day of May, 1865.

c. There was no proof of payment on the mortgage, other than endorsements by the assignee of the mortgage.—*Comp. L. § 5377.*

d. It is not necessary to plead the statute of limitations, in the matter of claims (and in this matter, with no declaration, no plea could be made,) brought against estates—the law interposes the statute to protect estates, and throws the burden of proof upon the claimant to show that his claim is not so barred, and in this case the only evidence offered, to show the claim within the life given it by statute, was the written endorsement made and signed by the assignee of the mortgage, on the mortgage, presumably made by mortgagors, who were not personally liable on the note.—*Comp. L. § 2924; Mich. Ins. Co. v. Brown, 11 Mich. 273.*

Conceding that there is proof of the payment of the note or debt, would contribution lie, upon a voluntary payment of this note, made by C. S. G. Jr's., administrators, after the statute of limitations had barred the claim, before allowance by probate proceedings—in a word, when there was no legal obligation upon the administrator of the estate to pay, which legal obligation (if it had existed) rested equally upon all the makers?—*2 Pars. on Bills and Notes, p. 253; 1 Pars. on Cont. p. 33, 34.*

Joslin & Blodget, for defendants in error.

1. The statute of limitations does not apply. A payment takes the debt out of the statute, no matter how proven, whether by endorsement on a note or mortgage, or receipted without endorsement, or by sworn testimony as to the fact.—*10 N. H. 489; 19 Vt. 59.*

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2. The appellee is entitled to contribution, whether the payment was voluntary or compulsory.

3. The payment in this case was compulsory, as the land mortgaged was willed to C. S. Goodrich, Jr. and the mortgage foreclosed, and the right of redemption nearly expired.

4. The only questions for consideration in this court, arising from the Judge's charge to the jury, were that the testimony of Achsah and M. H. Goodrich was immaterial, and the refusal of the judge to charge as requested.

The maker, who paid the note, was entitled to contribution for half the principal and interest, paid with interest from date of the payment, whether the payment was compulsory or voluntary.—*7 Mass. 255; 2 Met. 47; 22 E. L. & Eq. 362; 19 Pick. 260; 21 Id. 195.*

CHRISTIANCY J.

Chauncey S. Goodrich, Sr. the mortgagor, must be regarded as having executed this mortgage at the request of Harrison W. Goodrich and Chauncey S. Goodrich, Jr. (who were the only real debtors), and for their benefit, and to secure their debt. The note or contract for the payment of the money, recognizes the fact that the mortgage was executed for this purpose. Had the mortgagor been living at the time of the redemption, and had redeemed and paid the mortgage to save his land, it would have been so much money paid to the use of Harrison W. Goodrich and Chauncey S. Goodrich, Jr. the real debtors, for which he might have sustained his action against them had they been living.

The mortgagor's cause of action would have arisen from the payment made on redemption, and the statute would begin to run upon it from that time, without any reference to the time when the original creditor's right of action accrued against the debtors themselves, on their note

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or contract. — *Hale v. Andrus, 6 Cow. 225; Lomax v. Pendleton, 3 Cal. 538, 542; Conn v. Coburn, 7 N. H. 368; Odlin v. Greenleaf, 3 Id. 270; Butler v. Wright, 20 Johns. 367; Davies v. Humphreys, 6 Mees. & W. 153; Rodman v. Hedden, 10 Wend. 498.*

If the remedy upon the mortgage, as a lien upon the land, had been barred by the statute before foreclosure, and the mortgagor had afterwards paid the mortgage or allowed it to be foreclosed and the land to be sold, without taking advantage of the statute, there might be a question whether such voluntary payment would entitle him to an action against the parties originally liable for the debt. But the remedy on this mortgage to enforce the lien upon the land, was not barred at the time of the foreclosure and redemption — even admitting, as urged by the counsel for the plaintiff in error, that the action on the note had been barred in six years from the time the last instalment became due. —*Mich. Ins. Co. v. Brown, 11 Mich. 265.*

The relation of the mortgagor to the principal debtors was substantially that of a surety for their debt; with this difference from ordinary suretyship, that he had bound his land for the debt, instead of binding himself personally. And the real debtors, after having induced him to execute the mortgage for their benefit, and thus to place his land where it might be taken for their debt at any time within twenty years, cannot, after the land has been thus taken within that period, turn around upon him and refuse to repay the amount, because the personal action of the original creditor upon the paper which *they* gave *him* for the debt, has been barred by the statute of limitations.

But the remedy of the creditor against the real debtors upon their note or contract was not barred, as is claimed, in six years from the maturity of that paper. That note — or rather special contract — was under seal; and an action of debt might have been brought within ten years (which had not expired when the redemption took place, or when this

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claim was allowed by the commissioners). An action of *assumpsit* only was barred in six years. See § *1 Ch., 165 Comp. L.*, and compare § 7 of the same chapter with the subdivisions *1 and 4 of* § *1.*

Sec. 4550 Compiled Laws, does not compel a party to resort tc an action of assumpsit upon a sealed instrument.

Such would have been the rights and duties of the respective parties, had all of them been still living. Their deaths have not changed these rights and duties, except that they are now vested in or devolved upon their respective executors or administrators.

But the mortgagor dying, devised the mortgaged premises still subject to the mortgage, to Chauncey S. Goodrich, Jr. And had the latter not been one of the original debtors, bound (with Harrison W. Goodrich) to relieve the land from payment of the mortgage, and had he been still living, and redeemed the land from the mortgage sale, there can be no doubt that he would have stood in all the rights of the mortgagor to enforce payment of the whole amount thus paid against the real debtors. In other words, he would have been subrogated to all the rights of the mortgagor. But, being himself one of the original debtors, jointly liable with Harrison W. Goodrich to relieve the land from this charge; he, in paying the whole redemption money, pays one half, and only one half, in discharge of his own personal obligation; the other half he pays in discharge of the like obligation of Harrison W. Goodrich; and must therefore be entitled to recover of the latter this one-half by way of contribution, as so much money paid to his use.

Now it does not alter the case in principle, that his administrator has redeemed after his death; and the redemption gives him the same right to prove the amount against the estate of Harrison W. Goodrich. The mortgaged premises were, by the statute, assets in the hands of the administrator of Chauncey S. Goodrich, Jr. The condition of the estate is not shown; but in the absence of any showing,

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that the condition of the estate did not warrant him in redeeming, or that his action was not approved or directed by the Probate Court, we must presume that he acted in the proper discharge of his duty as administrator.

These considerations settle the case in favor of the claimant, unless his right was cut off or affected by the fact (which for the purposes of this case, under the offer to prove, may be taken for granted,) that Harrison W. and Chauncey S. Goodrich, Jr. who signed the note or contract for the payment of the money, were, at the date of the papers co-partners in trade with one Cornelius D. Goodrich; that the money obtained by the note and mortgage was borrowed with the knowledge and consent of the partnership, and used in the business of the firm, which was still unsettled, and the partnership debts not all paid.

This offer was not to show that the money was borrowed on account of the firm; and such was not the legal effect of the state of facts offered to be shown, in connection with the contracts in writing, executed by the two partners who borrowed the money. The loan was made by the two only, and they alone became personally responsible to the creditor.

Their paper, and not that of the firm, was given for it; and the creditor could not have sustained an action against the firm, nor have rendered them responsible for it, though it actually went into the firm and was used by them. The mode in which it was used or the hands into which it subsequently passed, did not alter the legal effect of the written contract by which it was obtained. — *Emly v. Lye, 15 East. 7; Exparte Hunter, 1 Atk. 225; Bevan v. Lewis, 1 Sim. 376; Graeff v. Hitchman, 5 Watts, 454;* and see *Loyd v. Freshfield, 2 Carr. & P. 325; Smith v. Craven, 1 Cromp. & Jer. 500.*

The legal effect of the transaction shown by the papers executed, when taken in connection with the facts proposed to be shown, was to make Harrison W. and Chauncey S. Goodrich, Jr. the borrowers, and only debtors, and the

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money obtained, their money. If they saw fit to let the firm have the money, whether in pursuance of a prior or subsequent understanding that it should be so used; this created, when the money was received by the firm, a new and independent contract, between the two original borrowers on the one side, and the firm on the other, by which the two became the creditors of the firm, and the firm became debtors to them for the amount.—*3 Kent's Com. (5th ed.) 41 and 42; Story on Part. 134, 140; Green v. Tanner, 8 Metc. 411; LeRoy v. Johnson, 2 Pet. 198; Sylvester v. Smith, 9 Mass. 119, 121; Ketchum v. Durkee, Hoff. Ch. 528; Foster v. Hall, 4 Humph. 346; Ripley v. Kingsbury, 1 Day, 150, note; Jacques v. Marquand, 6 Cow. 497; Foley v. Robards, 3 Iredell, Law, 179, 180; Willis v. Hill, 2 Dev. & Bat. 231; Bond v. Aitkin, 6 Watts & S. 165.*

This separate and independent contract, by which the money was loaned to the firm, can have no bearing upon the rights or duties, growing out of the original contract and mortgage by which the money was obtained, nor could it alter their duty to protect the land from the collateral mortgage given at their request.

The result is that the commissioner and the Circuit Court were right in allowing the claim; and the judgment of the Circuit Court must be affirmed, with costs to the appellee.

The other Justices concurred.

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Henry J. Buckley et al. v. Great Western Railway Co.

Common Carriers: Warehousemen. In the absence of any usage, special circumstances, or agreement, the liability of Railway Companies for goods in warehouse awaiting delivery is that of common carriers.

Heard April 8. Decided April 13.

Error to Wayne Circuit.

This was an action brought to recover damages from the Great Western Railway Co., for the loss of certain flour destroyed by fire on the 26th day of April, 1866, while in their depot at Detroit.

The following is a copy of the declaration:

"STATE OF MICHIGAN, WAYNE COUNTY.

Henry J. Buckley, John Stirling and Frederick Lasier, of the City of Detroit, in said county, as late partners in trade, and doing business under the name and style of Buckley & Co., plaintiffs, by D. C. Holbrook, their attorney, filing this their declaration, as commencement of suit, complain of the Great Western Railway Company of Canada, a foreign corporation, created and existing under the laws of Canada, in an action of trespass on the case.

For that, whereas, the defendant, before and at the time of the delivery of the goods and chattels to it, as next hereinafter mentioned, was and still is a Common Carrier of goods and chattels for hire, from London, Canada West, to Detroit, Michigan; and whereas, also, the plaintiff, whilst the defendant was such a common carrier, as aforesaid, to wit: on the 17th day of April, A. D. 1866, caused to be delivered to the said defendant, and the defendant then accepted and received of and from the plaintiffs three hundred barrels of flour of the plaintiffs, of great value, to wit.: of the value of six thousand dollars, to be safely carried and conveyed by the said defendant from London, aforesaid, to Detroit, aforesaid, and then and there to wit.: at Detroit, aforesaid, safely and securely to be delivered to the plain-

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tiffs, for a certain reasonable reward to the defendant in that behalf.

Yet the defendant not regarding its duty as such common carrier, as aforesaid, but contriving and fraudulently intending to deceive, defraud and injure the plaintiffs, in this behalf did not, nor would safely or securely carry or convey the said flour, aforesaid, from London, aforesaid, to Detroit, aforesaid, nor there, to wit: at Detroit, safely or securely to deliver the same for them, the said plaintiffs, but on the contrary thereof, the said defendant, so being such common carrier, as aforesaid, so carelessly and negligently behaved and conducted itself on the premises, that by and through the carelessness, negligence and default of the defendant on the premises, the said flour being of the value aforesaid, became and was wholly lost to the plaintiffs, whereby an action hath accrued to the said plaintiffs, to their damage, six thousand dollars, and therefore they bring suit."

The jury found a special verdict, and which is set forth in the opinion. The court rendered a judgment for plaintiff.

Gray & Moran, and *T. Romeyn*, for plaintiff in error.

The declaration in this action is simply for negligence, and consequent loss of goods by the defendants, as common carriers.

There is no count for delay, and for special damages resulting from it.

The defendants, if liable at all, are liable for the loss of the goods by their negligence; not for damages for the delay.

Under the finding of the jury two questions arise:

a. Are the defendants, in this form of action and under these pleadings, responsible for the loss of the goods by fire, on the ground that their liability as carriers had not terminated?

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b. Are they liable for the delay in conveying the goods, in consequence of the burning of the goods by a fire, to which they would not have been subjected but for such delay?

1. If the duty of the defendants as carriers had terminated at the time of the destruction of the flour, then the defendants are not liable, as warehousemen, for a loss by fire, without their negligence or fault.

2. The liability of the defendants as carriers had ceased, and they were responsible only as warehousemen.

a. Their liability must be determined on the principles of the common law.

The defendant below was a foreign corporation.

No usage is shown to exist as to notice of its arrival, storage, etc. In this respect this case differs from *McMillan's, 16 Mich. 83.*

No proof was given of the law of Canada.

b. At common law, the liability of the defendants as carriers had ceased.

The goods had actually been deposited in the warehouse of the defendants. This warehouse was situated beyond their terminus in Canada. Notice had been given to the plaintiffs, who commenced to remove the flour and took away a part of it, and who might, if they had chosen so to do, have had the warehouse kept open and removed the residue before the fire occurred, which destroyed the warehouse, without the fault of the defendants.

c. The subjecting the carrier to liability after the transit is ended and the goods warehoused, is opposed to the general principles of law, as laid down by elementary writers, and the whole course of modern legislation.—*Story on Bailment, § 536; See Chitty on Cont. 483; 2 Pars. on Cont. (5 Ed.) pp. 140, 183; Angell, on Carriers, § 313.*

The statutes of this and of other states, in granting of railroad charters, provide for the substitution of liabilities

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as warehousemen for that of carriers under those circumstances.

So does the legislation of Canada. And all our vast lake commerce is relieved by statute from liability from loss by fire, except in case of negligence.

d. The rule which would hold us liable in this case is opposed to the weight of decisions in the courts of this country.

The decisions of the state courts are referred to in the opinion delivered in the *McMillan case.* See argument of counsel for plaintiff, on page 82, and see pages 103, 124.

As to the United States decisions, see "*The Eddy,*" (*5 Wallace, 495*) which construes the doctrine of Parsons as we contend should be done.)—*Richardson v. Goddard, 23 How. 39.*

We think that the true rule on this subject is that laid down by Chief Justice *Shaw,* in *Norway Plains Co. v. Boston & Maine Railway, 1 Gray, 263.*

The doctrine for which we contend is briefly this: That where usage sanctions it, the carrier may deposit the goods at the termination of the transit in a suitable warehouse. His liability as carrier then ceases, and that of warehouseman commences; that it is his duty also to give notice of the arrival, unless universal usage excuses it.

All the liability attaching to and protecting millions of property elsewhere, under similar circumstances, remains. This was all the protection ever extended to property carried by water, after it had reached the end of the route, and now by legislation such liability is changed even to goods while on the route and in transit.

e. In this action (conceding the doctrine of the McMillan case,) the transit had ended by the delivery of the goods. Was there a delivery?

There was a delivery of a part, sufficient to constitute a perfect delivery on a sale, so as to pass title; sufficient to defeat the right of stoppage in transitu; sufficient to comply with the Statute of Frauds.

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The consignee might have removed them, if he had requested the defendants to keep open after the usual hours. He elected not to remove a part of them, but actually took away a part, and voluntarily left a part safe housed in a warehouse. Knowing all about the situation of the goods and their arrival in good order and their deposit, he might have insured against the loss of them.

3. The defendants are not liable on the ground of delay.

a. If the goods had been in fact delivered to and accepted by the plaintiff, then no adjudged case or elementary textbook holds the carrier liable.

b. He is not liable for the remote damages in this case.—*Morrison v. Davis, 20 Penn. 171; Denny v. N. Y. Cent. R. R. Co. 13 Gray, 481; 7 Gray, 86; 2 Greenl. Ev. 250; Angell on Carr. 201; 2 Red. on Railway, 6 and 7; Contra, Read v. Spaulding, 5 Bosw. 395; Davis v. Garrett, 6 Bing. 716; Williams v. Grant, 1 Conn. 492; 12 Conn. 410; 4 Whart. 204; 3 Saund. 610; 30 N. Y. 564, 630; 29 Id. 115.*

D. C. Holbrook, for defendants in error.

The special verdict in this case shows the facts.

The defendants in error contend, in addition to the ordinary liability of a common carrier, to keep goods safely a reasonable time after their receipt, that the delay in carrying should also make the plaintiff in error liable in this case.—*Reed v. Spalding, 30 N. Y. 630; Michael v. N. Y C. R. R. Id. 564; Wood v. Crocker, 18 Wis. 395; 5 Bosw. 395; 38 Vermont, 402; Contra, 13 Gray, 481; 20 Penn. St. 171.*

The law of carriers, as to their liability, either as such or as warehousemen, was so fully discussed in the cases of *McMillan and others,* reported *16 Mich.* that a review of all the cases here would be useless.

The fact that a part of the flour was delivered, does not alter the case; the same fact was involved in the case of *King v. The M. S. & N. I. R. R. 16 Mich. Rep. 132.*

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The defendants in this case were notified of the receipt, of the flour, at 5½ o'clock in the afternoon of the 26th April. The business of the day closed at 6 o'clock P. M., and had the defendants in error not taken any flour away, the court would have held the plaintiff in error liable.

It would seem strange that, because the defendants in error succeeded after business hours in getting part only, they lose the balance. 300 barrels of flour cannot be moved in the night very well, and there was no expectation that a single barrel would have been touched.

GRAVES J.

The plaintiffs by their declaration allege that at the time therein mentioned, the company were common carriers between London, in Canada, and Detroit in Michigan, and that being such common carriers, the plaintiffs delivered to them three hundred barrels of flour belonging to the plaintiffs of the value of $6,000 to be safely carried and conveyed by the company from London to Detroit, and then and there by the company to be safely and securely delivered to the plaintiffs, and that the company did not nor would safely or securely carry the flour to Detroit, nor at the latter place safely or securely deliver the same, whereby it was lost to the plaintiffs.

The company having pleaded the general issue, the jury upon the trial returned a special verdict by which they found that on the 17th of April, 1866, the plaintiffs delivered of their own property to the company at London, three hundred barrels of flour to be transported by the company to Detroit, and then by the latter to be delivered to the plaintiffs, as common carriers; that on the 24th of April the plaintiffs complained that the flour was unnecesarily delayed; that on the 26th of April, in the afternoon, it arrived in Detroit, and was deposited in the warehouse of the company, of which the plaintiffs were notified at half past

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five in the same afternoon, and that the plaintiffs then commenced receiving the flour and took away ten barrels a little after six of the same evening, which was the usual hour of closing business for the day at the depot; that it was the custom of the company to keep open after business hours to deliver goods if requested, but such request was not made in this case; that on the night of that day the balance of the flour was destroyed by fire without negligence or fault of the company; that in the ordinary course of business, the company should have delivered the flour in three days after its receipt, and was therefore guilty of negligence in not carrying it from London to Detroit with diligence.

The damages were fixed by the jury at $3,459 44, to be recovered by the plaintiffs, if the court should think them entitled to judgment upon the facts.

Upon this verdict the court below awarded judgment in favor of the plaintiffs, and we are required to determine whether in this there was error.

The company object to a recovery against them upon two grounds. First, that their duty as carriers had ceased at the time of the fire; and second, that the delay in conveying the flour to Detroit, as found by the jury, will not support the judgment.

It is proper to observe that this is a special verdict, formally sufficient, and which we are required to examine according to the settled rules applicable to such proceedings. We are not permitted to assume any facts not therein stated, or to infer any from those found, but must take the finding as the jury have made it, subject however to the allegations in the pleadings. — *Street v. Roberts, 2 Sid. 86; Tancred v. Christy, 12 Mees. and Wels. 316; Jenks v. Hallet and Bowne, 1 Caines R. 60; Seward v. Jackson, 8 Cow. 406; McCarty v. Hudsons, 24 Wend. 291; Birckhead v. Brown, 5 Hill, 634-646; Hill v. Covell, 1 Comstock 522; Eisemann v. Swan, 6 Bosworth, 668; People v. Wells, 8 Mich. 104.*

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A strict observance of the law on this subject was required of the court below, in order to preserve the relative powers of the court and jury; and this court, having in the premises neither original jurisdiction nor authority to ascertain facts by inference, or to presume any not actually found, should sedulously endeavor to avoid any infraction of these rules.

An opposite course would favor confusion of the separate functions of court and jury; would tend to subvert a vital distinction between original and appellate jurisdiction, and would imply an assumption of right in this court to go behind the record to which the law has carefully confined us.

On recurring to the declaration, it is very obvious that the plaintiffs have not counted on delay in the carriage of the flour, while the verdict, when coupled with the pleadings, and restricted by them, as it must be, denotes very clearly that the real ground of complaint against the company was the non-delivery.

It is alleged in the declaration that the company assumed to carry and convey safely, and, thereupon, safely and securely to deliver; and, if this were taken in the broadest sense, instead of most strictly against the pleader it could not be considered as averring a duty or undertaking to carry within any particular time.

Admitting it to be one of the duties of the carrier to transport without unreasonable delay, the neglect of that duty could not be a ground of recovery against him, without an averment to express and charge the duty, and the assignment of a breach of it.

I am therefore of opinion that for this reason, without suggesting others, the plaintiffs could claim no right to recover for the negligent delay in carriage which seems to have occurred.

It remains to inquire, whether a recovery upon this record was authorized on the ground of non-delivery.

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The undertaking of the company, as common carriers, to transport the plaintiffs' flour from London to Detroit, and to deliver it safely and securely at the latter place, to the plaintiffs, was distinctly alleged; and the jury as distinctly found this allegation to be true. It was likewise alleged that, by the negligence and default of the company in the premises, the flour was lost to the plaintiffs; and the jury found that the carriage to Detroit took place, but that the flour, after reaching the warehouse of the company at the latter place, was, with the exception of ten barrels, removed by the plaintiffs, destroyed by fire in the warehouse in the following night. These findings, taken by themselves, supported that part of the plaintiffs' case based on non-delivery, and established a *prima facie* right in the plaintiffs to recover for the property destroyed.

The flour, according to the record before us, having been received by the company, and apparently in their character of carriers, simply for transportation to Detroit, and delivery to the plaintiffs at that place, it was for the company to show that the non-delivery, or the loss at their warehouse, which made delivery impossible, proceeded from causes, or was marked by circumstances, which relieved them from the liability imputed by the plaintiffs.

Having come under the responsibilities of carriers by receiving in that character, and ostensibly in that character only, the property for transportation and delivery, these responsibilities must have necessarily continued until delivery, or the occurrence of some event which the law would consider as sufficient to excuse it.

Recognizing the necessity of meeting the case thus made against them, the company take the position that a circumstance did occur, that an event did take place which relieved them from liability for the loss of the property.

They claim that, inasmuch as the flour had reached their warehouse or depot in Detroit, and had been by them deposited therein, their responsibility as carriers was by such

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act exchanged for their responsibility as warehousemen, and in which character of course they would not be liable.

No question arises in the case as to the necessity of notice, as that was, in fact, given, and the verdict contained no facts which will enable us to judge of the effect of the notice, in respect to the right of the company to shift the character of the bailment. It must be assumed that no such facts existed.

That the same party may be both carrier and warehouseman at the same time, cannot be disputed; but the two employments, if carried on by one party, must after all be as separate and distinct in quality as though they were pursued by different parties, and their functions cannot be so commingled as to attach to the same property at the same time.

This is made evident by the diversity of duties and responsibilities of the two employments, and the nature and incidents of the business; and the ground taken by the company that the custody was passed from and by them in the character of carriers to themselves in their character of warehousemen, and that this saved them from liability, is an admission of the ample nature of the distinction.

Indeed, the difference is quite as striking between the quality of carrier and that of warehouseman, as between a party in his personal capacity, and in that of administrator.

As, therefore, the two characters are completely distinguishable, though belonging to the same party, it seems a necessary result that an engagement or agreement, ostensibly in the one only, does not by necessity imply any engagement or employment in the other also.

The circumstance that a party acts generally as a carrier or being such, assumes in a given case, to handle property apparently in that character only, can no more imply that an agreement has been made with him to deal with the property as a warehouseman, than will an engagement with

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a warehouseman to store goods imply a contract with the latter to act as carrier. And the agreement by the carrier to transport goods can never by itself involve an agreement with him that he may reduce his responsibility as carrier to that of warehouseman, at the end of his route by deposit in his depot.

Without presuming to question the necessity of applying established principles to those cases to which they are suited, it appears to me that some of the courts in their desire to lay down general rules, have not attended sufficiently to the circumstance that carriers and their customers are still at liberty to regulate by contract, express or implied, much of the business to be done between them; and that the propriety of the application of this or that legal rule must often depend upon such regulations.

The course to be pursued by the carrier, to shield himself from further responsibility in his quality of carrier when the transportation is accomplished, is not the subject of abstract law disconnected from the surrounding circumstances, but is a matter depending upon contract, and to be determined by reference to the express stipulations of the parties, or the varying facts from which, when presented, the law will infer the rights, duties and obligations of the parties.

When the party has taken it upon himself to act in his character of carrier in a given case, it becomes a question for the jury, upon the evidence, or for the court upon the facts when specially found, whether he also obtained the right or became obliged to act as warehouseman also in any stage of the business; and the mere fact that the carrier though a railroad company, possessed a warehousing depot at the end of the route, would not suffice to raise the legal inference of a right to shift the characters by immediate deposit in the warehouse, especially if it appear that the carrier was ostensibly employed as carrier only.

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If, when prosecuted for non-delivery to the consignee, the carrier would excuse himself by showing that the property was destroyed by fire, and that the destruction occurred shortly after he had changed the nature of the bailment, and exchanged his character of carrier for that of warehouseman touching the goods in question, he would have to satisfy the jury that the passage from himself as carrier to himself as warehouseman, was not simply his mere voluntary act, but one either warranted by an express contract, or a contract fairly inferrible from the nature of the business, the known necessities under which it was carried on, the established usage on the subject and the like; and in case of a special verdict it would be necessary that the express contract, if any, should be found, or, if not, that the particular facts should be stated from which the law would infer the right asserted by the carrier.

We have seen that the verdict in this case finds in terms that the company in the particular character of carriers undertook to transport the flour and deliver it to the plaintiffs at Detroit, while no undertaking by them as warehousemen, or any agreement by them in or for that character is found by the jury.

It appears that the company were carriers by rail, and it is shown by the verdict that they had a warehousing depot at Detroit, in which they in fact deposited the flour a few hours before the fire, and that they had a custom to keep open after business hours when requested, for the purpose of making delivery, and these are the only facts in the verdict which can be claimed to warrant the legal inference of any right of the company to cast off their responsibility as carriers by deposit in their warehouse.

The finding that the company undertook as carriers to transport and deliver, could not imply as matter of law the right claimed by them to change the form of the bailment by their own act of deposit in the warehouse; but in the state of this record such finding would tend rather to

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exclude the idea of an agreement that the company should possess the right to deal with the property as warehousemen or in any character than that of carriers; and it seems to me that the other facts taken by themselves or with those just mentioned, can afford no ground whatever to infer as matter of law the right claimed by the company. The existence of those facts appears to be quite as consistent with the absence as with the presence of the right asserted, since, for aught that is stated, a delivery at the warehousing depot without the intervention of the character of warehousemen or depository was altogether practicable, easy, and usual, and was alone within the contemplation of the parties. The verdict discloses no usage or other circumstance to justify us in saying that the bailment for carriage included one for storage also, or which, in my judgment, would warrant the inference that the company were entitled to relieve themselves as carriers by the act of passing the flour from the cars to the warehousing depot. I think, therefore, that the judgment of the court below should be affirmed, with costs.

COOLEY CH. J. and CHRISTIANCY J. concurred.

CAMPBELL J.

I adhere to the opinion which I expressed in the case of *McMillan v. Michigan Southern and Northern Indiana Railroad Company, 16 Mich. 79,* that the liability of railway companies for goods in warehouse awaiting delivery is that of warehousemen, and not common carriers. As I gave my reasons for this conclusion in that case, and as nothing has been suggested which has in any way modified them, I do not deem it necessary to repeat them. I think the plaintiffs in error are entitled to judgment of reversal.

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John King Jr. v. Geo. H. Potter.

Ejectment: Tax Title: Improvements: Description. Under the statute—*2 Comp. L. f. 4603*—permitting the defendant in ejectment, or others through whom he claims, claiming title to lands by a deed of the Auditor General, &c. to recover compensation for improvements made therein, &c.

Held, That this statute applies only to the lands described in the plaintiffs declaration, and, in the deeds, or other instruments through which defendant claims.

The identity of the lands claimed by the defendant, with those claimed by the plaintiff in his declaration, must be established by the rules of law and evidence applicable to the instruments under which plaintiff and defendant respectively claim, and which they produce in support of their respective titles.

Held further, That the plaintiff in this case, having no privity or connection with the defendant or those through whom he claims, and being in no way responsible, either for the description in these tax deeds or the attempt to take possession under them, there is no just principle upon which he can be made to suffer for the mistakes of others through such deeds.

A party purchasing at a tax sale, as between himself and the owner of other lands, is bound at his peril, to take notice of the description in his own deed: and if he or his grantees make a mistake and go on the lands of others, they must bear the consequences.

Heard April 9th. Decided April 13th.

Error to St. Clair Circuit.

This was an action to recover possession of certain lands in St. Clair County.

The defendant below claimed title to the land described in the plaintiff's declaration, by virtue of several tax deeds and a sheriff's deed. He also claimed compensation for buildings and improvements made by him, having been in possession of the premises for six years and more, prior to the commencement of this suit.

The plaintiff proved his title to the premises by a patent from the United States to himself.

The tax deeds and the sheriff's deed contained descriptions different from those in the declaration, and not in accordance with those of the United States surveys, or by metes and bounds.

The defendant, nevertheless, claimed that if he went into possession under the tax deeds in good faith, and re-

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mained there six years and made improvements he was entitled to compensation under the statute.—*2 Comp. L.* § *4,603.*

The jury found that the plaintiff was the owner of the land described in the declaration; that the defendant unlawfully held them — estimated the increased value of the premises by reason of the improvements, at several hundred dollars, and assessed plaintiff's damages at six cents.

Mitchell & Farrand, for plaintiff in error.

1. The Circuit Court erred in allowing any questions to be asked or testimony given tending to show that the land could be found in any other than a government description.

The object of this testimony was to show that the land might have been somewhere else than in "lot one," had the government made such other description.

The north-west quarter of section nine had never been surveyed or laid out, and any testimony tending to show that the lot could be found in such a quarter, if surveyed, was improper, and irrelevant to the issue. The government survey and division was the only matter that should govern.

"If the tract be a subdivision of a section authorized by the United States for the sale of the public lands, it shall be described by a designation of such subdivision, with the number of the section, township and range."—*Comp. Laws,* § *804, Sub. 2.*

We submit that parol proof cannot be admitted to change or vary the location, or to fix assessed land in any place other than the legal subdivision designated.

2. The deed from the state to Davenport, and subsequent deeds transferring that title, were clearly inadmissible.

There was no such legal subdivision of the section.

The plaintiff bought lot one. The sale of N. E. ¼ of N. W. ¼ could not affect his title, as he was not bound to look for such a description. The owner had no reason,

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and was not bound to look for such a description, in the payment of his taxes; and title under a different description must be void for all purposes. If the true description is not necessary, the result would be to deprive a man of his property, without any knowledge by him of any proceeding against it.—*Thames Manufacturing Co. v. Lother, 7 Conn. 550; Hubbell* v. *Weldon, Hill & Denio, 139.*

This kind of description defeats the owner from an opportunity of paying taxes, and the deed is void.—*Tallman v. White, 2 Comst. 67; Blackwell on Tax-titles, 123.*

3. All the other tax deeds were irrelevant on the same ground.

4. The question whether the court erred in admitting proofs of increased value, by reason of improvements, is determined by the decision of the preceding and following propositions.

5. By the proofs it is clear that the northeast quarter of the northwest quarter was not a proper government description, The plaintiff paid all the taxes he could find assessed or returned against his lands. No taxes were assessed against this or any other land in 1843, on which the taxes were not paid. The northeast quarter of the northwest quarter was not assessed at all, and even if it could be said to cover the land in controversy, the Auditor General's deed was not founded upon any tax. The re-assessment in 1843, for taxes in 1841, will not sustain the deed, especially where it appears that there was no tax for the year 1841. There was no delinquent tax as the foundation of a deed. The defendant cannot claim under Section 4,603, of Compiled Laws, that he, or those under whom he holds, entered into and was in actual possession, claiming title by virtue of a sale made by the Auditor General, for non-payment of taxes. To make such a claim valid there must have been some tax, regular or irregular, as a basis of the deed. There was none here. A contrary doctrine would lead to gross injustice.

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6. The court erred in charging the jury that the defendant, and those under whom he claims, having been in possession more than six years, claiming title under a tax deed, when there was in fact a sale made and deed given, he was entitled to compensation; and in refusing to charge the jury, that no taxes having been assessed on the land, and the land not returned as delinquent, &c., the subsequent sale and deed did not make such a title as would entitle the claimant to compensation, &c.

The question of possession, under a tax title, should have been left to the jury. We reiterate our previous claim, that there must have been some sort of tax assessed and levied.

"The right to sell is founded upon the fact of non-payment."

Where there is no tax due, the deed is void, and confers no title.—*Jackson v. Clark, 18 Johns. 441; Jackson v. Esty, 7 Wend. 148; 4 Wheat. 79.*

Conger & Harris, and *C. I. Walker*, for defendants in error.

1. If one goes into possession of real estate under a claim of title from two sources, viz., one a title from the Auditor General, and the other from another source, and continues in possession thereof six successive years, and makes improvements, if both of the titles fail, is he entitled to compensation for his improvements under *2 Comp. L. § 4603?*

The statute under consideration is founded in the strongest equity and the clearest justice, and should be most liberally construed to carry out its equitable purpose. —*Longworth v. Wolfinger, 6 Ohio, 1; Davis v. Powell, 31 Id. 320; Whitney v. Richardson, 31 Vermont, 305.*

It in substance provides that if one shall be in the actual possession of land for six successive years, claiming title thereto under a deed from the Auditor General, or

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certain other officers, he shall be entitled to compensation for the improvements made thereon.—*2 Comp. L. § 4603.*

This does but justice to the claimant in good faith, while it does no injustice to the owner of the legal title; for he only pays the actual value of the improvements made.

If one is in the possession of land, claiming title thereto by virtue of several deeds from different sources, he claims under each of those deeds.

2. If one goes into possession of lands under an Auditor General's deed, in good faith claiming title thereto, but the description in said deed is so imperfect or uncertain that no title can pass thereby, and he continue in possession thereof making improvements, can he recover for the value of such improvements under said section 4603?

The descriptions in the deeds from the Auditor General were not in accordance with those of the United States survey, or by metes and bounds, and, for the purpose of this argument, it may be admitted that the land could not be precisely located thereunder. — *Amberg v. Rogers, 9 Mich. 332.*

But we insist that if defendant in good faith claimed title by virtue of the deeds, it is sufficient, whether the deeds described the land he occupied, or other land, or, with certainty, no land at all. — *Wendell v. Moulton, 6 Fost. 41. 46, 68; Waldron v. Woodcock, 15 Ohio, 13; Shrol v. Blinker, Id. 152; Beardsley v. Chapman, 1 Id. 118.*

3. If land be sold for taxes, and an Auditor General's deed be given, is the purchaser, under such sale and deed, entitled to the benefits of section 4603, where the land thus sold and deeded was assessed and returned by a very different description from that by which it purports to have been sold as delinquent for the non-payment thereof?

There can be no doubt but that one who is in possession of land by virtue of a deed from the Auditor

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General, is within the very letter as well as the spirit of the statute, and it is immaterial whether the tax for which it was sold was merely invalid, or whether it was sold by mistake without any tax whatever, or whether it was sold by a different description from that by which it was assessed.

The statute was intended to meet every case where possession is held by virtue of an Auditor General's deed.

CHRISTIANCY J.

By section 4603 Compiled Laws, (being sec. 50 of Ch. 134) it is provided that "when the defendant in ejectment, or any person through whom he claims title, shall have been in actual possession of the premises for six successive years, or more, after this chapter shall take effect as a law, and before the commencement of the action and claiming title either by virtue of, or in opposition to a sale made by any executor, administrator or guardian, or the Auditor General, or any county treasurer, or other person or body corporate authorized by any statute to make sale of land for non-payment of taxes, such defendant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him, or any person through whom he claims title."

The first question presented by this case is, whether this statute extends to any other lands than those described in the plaintiff's declaration and in the deeds or other instruments through which the defendant claims title.

It is too obvious to require or admit of argument that the lands "claimed" by the defendant and of which he has been "in possession," must be the same or some of the same described in and claimed by the declaration. The statute clearly contemplates their identity, and it cannot possibly be made to apply to any other.

The defendant here undertakes to "claim title" under a tax "sale" and deed by the Auditor General. And when-

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ever the defendant "claims title" "by virtue of a sale made by any executor, administrator, guardian, Auditor General," &c., as such title can only be by deed, we think it clear that, in order to bring a defendant within the fair intent of this statute, the premises to which he thus claims title must be such only as are described in the deed or deeds through which he "claims title," and that this description must be such as, under the rule of law applicable to the deed under which he claims, are sufficient for the purpose of identifying the land. In other words, this question being one of identity of the premises claimed by the defendant with those claimed in the plaintiff's declaration, must be decided by the rules of law and evidence applicable to the instruments under which the plaintiff and the defendant respectively claim, and which each produces in support of his respective title or claim. The statute, we think, was never intended to apply to a case where the identity was not thus established.

By reference to the plat, showing the government subdivisions of this fractional section, the correctness of which is not disputed, it will be seen that the section was rendered fractional by the line of the Chippeway Reservation (of which this fractional section is a part) cutting off nearly all of what, had the section been entire, would have constituted the southwest quarter, and a large portion of what would have been the southeast quarter and the northwest quarter, but leaving the northeast quarter untouched.

By reference to the field notes also which were in evidence, it will be seen that the government surveyor, in surveying and subdividing this fractional section, established a quarter post on the north line at the usual distance of forty chains west of the northeast corner, and that this was $27\frac{56}{100}$ chains from the point where the section line extended westward, struck the west line of the reservation; and that this reservation line ran in nearly a southeast-

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wardly direction striking the south line of the section only $20\frac{50}{100}$ chains west of the southeast corner.

It will also be seen, that what lay west of the quarter section line, and north of the center line of the section (which, if not otherwise subdivided, would have constituted the northwest fractional quarter) was by the government subdivided, so as to make a lot of twenty chains in width (from north to south) and $27\frac{56}{100}$ chains along the north section line, and of less length on the south. This lot was marked and numbered on the plat as lot number 1 (one). The balance of what might have been called the northwest fractional quarter, was included in a lot containing $59\frac{50}{100}$ acres, composed in part of forty acres, which, had it not been thus included, would have constituted, and might have been described as the southwest quarter of the northeast quarter. This lot of $59\frac{50}{100}$ acres, was marked as lot number two, of the fractional section.

Properly speaking, therefore, there was no such government subdivision as the northwest fractional quarter; and in no possible sense was there any such government subdivision as the east or west half or part, or the northeast, or southwest, or northwest half or part of the northwest fractional quarter; nor would any land with sufficient certainty be designated by such description. The premises described in the plaintiff's declaration, it is admitted, were a part of lot number one, above described.

By the statute (*Comp. Laws*, § *804, Sub. 2*)—and a similar provision was contained in the previous laws—this land should have been described, in assessing it, and consequently in a deed on tax sale, by the designation of its subdivision according to the public surveys of the United States.

There is no pretence that any of these tax deeds under which the defendant undertook to claim, complied with

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this provision—most (if not all, but one of them) expressly described the land as situate on the northeast quarter or northeast fractional quarter, which, by no physical possibility, could be made to include any part of lot "one," which was wholly west of that quarter. And no oral evidence was admissible to establish so manifest an absurdity—no evidence being offered to impeach the correctness of the plat.

One of the deeds, however, (that to Ira Davenport) described the land as the "northeast fractional quarter of the northwest quarter of section nine," &c. Now it is not only clear that there was no such legal subdivision, but that applying this description to the land without reference to its legal subdivisions, the land intended must be wholly uncertain.

But we need not enquire whether this description would be or could be made sufficient, as between an individual grantor and grantee. The legislature have not left us at liberty to adopt any such principle. They have seen fit, in their wisdom, to fix certain rules touching the sufficiency of descriptions for purposes of taxation and deeds on tax sales. And we could not hold that sufficient which they have deemed insufficient.

We have failed to see the force of the argument so ably and earnestly pressed upon us by the counsel for defendant in error; that, though the description does not comply with the statute and is insufficient to pass the title under the tax deed, and though the tax deed described other or different land than those in suit, or, with certainty, no land at all; yet if this defendant claimed the lands in suit in good faith by virtue of the deeds, this is sufficient to give him the benefit of the statute in reference to improvements.

The case of *Wendell v. Moulton, 6 Fost.* (*N. H.*) *41*, which he cites, has, we think, no bearing upon a case like the present. The plaintiff had given to the defendant

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or the person under whom he claimed, a bond for a deed, and afterwards a deed of a portion of a larger tract owned by the plaintiffs. The purchaser had, with full knowledge of the plaintiffs, taken possession of a portion which, on survey many years after, was found not to be within the description given in the instrument. Extensive improvements had been made in good faith by the grantee. The possession was open and visible, and well known to the plaintiffs. The improvements were made with his full knowledge and without objection. He, as well as the defendant and those under whom he claimed, was either ignorant of the mistake, or he knew the mistake of his grantee and purposely led him into the error and the making of the improvements. There was very strong evidence of this fraud. The case was such, that in a court of equity, the defendant would hardly have needed the aid of a statute to secure him the benefit of his improvements. Their statute was much more general than ours. It applied to all defendants in real actions, who had been in actual and peaceable possession for six years "under a supposed legal title." If the plaintiff in that case was mistaken, he seems to have been as much responsible for the mistake as the grantee, and if he acted fraudulently, the whole responsibility was his.

But in the case before us, the plaintiff has no privity or connection with, but is an entire stranger in law to the grantor and the grantee, and in no way responsible either for the description in these tax deeds or the attempt to take possession under them; and there is no just principle upon which he can be made to suffer, or be accountable, for a mistake of the parties claiming under the deed, in taking possession of the plaintiff's land, or for improvements made against his will, and which, by reason of the situation of other land of his, may, for aught we know, be an injury to him, though, when considered only with reference to the particular land improved, the value of that particular portion might be increased.

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On the other hand, as respects the question of the good faith of the defendant or those under whom he claims, we think the party purchasing under a tax sale must, as between him and the owner of other lands, be bound at his peril to take notice of the description in his own deed, and to know what land, if any, it describes, and whether it sufficiently describes any. And if the defendants or those under whom they claim by tax deeds, have made a mistake and gone on to the land of the plaintiff, instead of that described in their deeds, it is certainly more equitable that the defendant who has, or claims under, the deed, and acts under it, should bear the consequences or burden of the mistake, than the plaintiff, who is a stranger to it, who has no occasion to know of its existence, and who, if he saw it, would, at the same time, see that it did not affect his land.

As to the argument, that it is just and equitable, as a general rule, to allow the defendant in ejectment, for improvements made by him, it is sufficient to say, the legislature have thought otherwise.

This disposes of the present case, and renders it unnecessary to notice the point raised by the plaintiff in error, that the defendant in this case claimed title under an execution sale as well as the tax sales. The effect of such a double claim, as it may bear upon the question of improvements, will be decided in the case of *King v. Harrington*, argued at the present term, and not yet disposed of.

The judgment of the Circuit Court, so far as it relates to the improvements, in favor of defendants, must be reversed, with costs; and the judgment, so far as it is in favor of the plaintiff below for the recovery of the land, must be affirmed.

The other Justices concurred.

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Francis Gilman v. Hyacinth Riopelle.

Authentication of U. S. documents: Certificates: State law. The mode of authenticating the documents, records and proceedings of any of the departments, or courts of the United States is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of a State. — *Lacey v. Davis, 4 Mich. 140.*

Official certificate: Evidence to what extent. In an action of ejectment, a paper purporting to be a copy of a surveyor's field notes on file in the United States Land Office, and referring to several distinct land claims, was offered in evidence, under an objection that the official certificate attached did not cover all of the claims contained therein.

Held, that it does not follow that because something is incorporated in such a paper which the certificate does not cover, the paper is to be wholly excluded.

The fact that a portion of the recitals are not authenticated may be a sufficient reason why such portion should not be read, but cannot constitute a ground for rejecting another and entirely distinct and separate portion which is properly authenticated.

Evidence: Consideration in conveyance: Value of premises. Where the question in dispute is, whether a quit claim deed conveyed the fee in the land described, or a leasehold interest only, it may be proper to put in evidence, to show that the real value of the land was many times greater than the consideration stated in the deed.

Evidence: Hearsay: Proof of tenancy. Where, in ejectment one party claims that a person who had been in possession of the land in dispute occupied, as owner, while the other claims that he was in under a contract of lease, it is proper for the latter to give evidence of a conversation between a claimant to the land and such person, before the latter took possession, tending to show negotiations for a leasing by him. Proof of such a conversation would not be hearsay, and it would be as competent to make it by a bystander as by the parties thereto.

Evidence of motive. A witness cannot be asked why another party "wished" a certain act done which he directed, unless some statement of his purpose or motive accompanied the direction.

Tax-titles based upon unpaid taxes by one in possession: Evidence. A deed given on a sale of lands for taxes cannot be excluded as evidence, on the ground that the tax purchaser was in possession when the tax accrued, if the fact of such possession is in dispute, and not admitted by the claimant under the tax title.

Nor if the possession, at the time were undisputed, would it be sufficient ground for rejecting the deed, as that fact would go to the validity of the deed, and not to its admissibility.

Tax-Title: Statute of Limitations: Possession: Evidence. The ten years limitation in the tax law of 1842—*Laws of 1842, p. 133*—does not apply in favor of a party who was in possession under some other claim, at the time of obtaining the tax title. It intends that the party who seeks the benefit of the limitation shall enter, or shall have entered, into the actual possession under his tax deed.

Held, also, that this is an objection going to the effect and sufficiency of the deed, and not to its admissibility.

Conveyance; Description of premises. Where definite and permanent boundaries are

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given, a deed must be considered to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned.

Conveyance: Description for purposes of assessment. The premises in a tax deed were described as "that part of private claim 61 lying east of the north branch of the River Ecorse, in township 3 S. of R. 11 E."

It was objected that this description was insufficient for the purposes of assessment under the tax law of 1843, because not being the subdivision of any section authorized by the United States, for the sale of public lands, it was necessary under Section 2 (Laws of 1843, p. 66) "to state the name or number of the lot or tract, or by what other lands it is bounded."

Held, that the description was sufficient. The requirement that the premises shall be described by the lands which bound them, has reference to those cases in which the tract is not known by name or number, and in which such a description would be most likely to attract the attention of the person interested in the payment of the tax.

Evidence: Custom as to gift of land to eldest son. Evidence of a custom among old French settlers to give their farms to their eldest sons, is not admissible to establish such a gift in a particular case, where no direct evidence of the gift has been given.

Heard January 7. Decided April 13.

Error to Wayne Circuit.

This was an action of ejectment to recover 20 $\frac{74}{100}$ acres upon Private Claim 61, in town 3 south, range 11 east, being Ecorse, Wayne County; and one half acre nearly adjoining. Both parcels lie east of the north branch of the Ecorse river, and between the river and the northern line of town 3. The claim seems never to have been patented to any person by the U. S. Government. Plaintiff claims title through one Ambroise Riopelle, whom he alleges claimed the land at, and before, the evacuation, of this country by the English, under the *Jay Treaty* in 1796. That Dominique Riopelle, a younger son of old Ambroise, also claimed to own, and exercised acts of ownership over the whole claim, although no deed passed from Ambroise to him; and that Dominique deeded to plaintiff and Alexander, his brother, which brother quit-claimed to plaintiff that part in question in this suit. Plaintiff claimed that both Alexander and himself had exercised acts of ownership over the land, and that the possession of defendant and those through whom he claimed, was but a tenancy under plaintiff or his grantors.

Defendant claimed a two-fold title:

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First.—Through Toussaint Riopelle, who was the eldest son of old Ambroise Riopelle, who, it is claimed entered and exercised acts of ownership after his father's death; through Sophia Vermet, wife of Joseph Vermet, and daughter of Toussaint, who entered in 1832, claiming title in fee, and who, with Joseph Vermet, her husband, conveyed to Abraham Blanchet by deed, July 8, 1845, who conveyed to Augustine Vieux, by deed, January 28th, 1852, who conveyed to Francis Gilman, defendant, by deed, December 20, 1852. The possession, since July 8, 1845, of Blanchet, Vieux and defendant, has been uninterrupted, and, as defendant insists, under claim of ownership.

Second.— Under a tax deed from the State of Michigan, dated November 30, 1846, for tax sale made October 6, 1845, for delinquent taxes for the year 1843.

Judgment was rendered for plaintiff.

The exceptions to the rulings of the Court are stated in the opinion.

The following are the errors assigned:

1. The Court erred in admitting in evidence the copy of the field notes of Private Claim 61, and the adjoining claims 118 and 119, with the certificate thereto attached.

2. The Court erred in admitting the evidence of defendant in error as to the value of the land in controversy in 1845, when it was first fenced.

3. The Court erred in permitting Alexander Riopelle to testify to a conversation between Joseph and Antoine Vermet, when Joseph came to Antoine to see about getting the place.

4. The Court erred in permitting Antoine Vermet to answer the question, "why did Dominique wish the (Laribell) house thrown down?"

5. The Court erred in excluding from evidence the Tax Deed from the State of Michigan to Abram Blanchet, dated November 3, 1846.

6. The Court erred in refusing to permit Burdeno to

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answer the question, "what was the custom among the old French settlers as to giving their farms to their eldest sons?"

H. M. & W. E. Cheever, for plaintiff in error.

1. The certificate of the copies of the field notes was defective. It purported to be a certificate of the notes of but one of the Private Claims in question.

2. The evidence touching the value of the land in 1845, we submit, was irrelevant and tended to lead the jury from the true question in issue. The true principle upon which this kind of testimony should be excluded is, that it does not relate to the issue, and tends to call attention from the point in issue, to excite prejudice or sympathy, and the adverse party is not prepared to rebut it.—*1 Greenl. on Ev. § 52.*

"It is not proper to allow irrelevant testimony to be considered when it can at all tend to embarrass the cause or mislead the jury."—*Penn. Mining Co. v. Brady, 14 Mich. 265.*

3. The conversation between Joseph and Antoine Vermet, in which statements prejudicial to his claim of title were made by Joseph, was inadmissible, as Joseph was not in possession of the land at the time. This action was based on possessory title, and the declarations of the parties, or those under whom either of them claimed, were admissible only as qualifying, or affecting their acts of possession. They are received to show the the nature of the possession. Hence we say, the thing to be qualified must exist, in order to admit the qualification. To admit the statements or declarations of a party, a stranger to the record—made at a time when he is not in possession—is, in effect, to admit hearsay evidence without qualification. These declarations are only relieved from the general disqualifications which attends hearsay evidence, when they possess the saving characteristic of concurrent possession. In other words, the ad-

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missions must be those of an occupant.—*5 Carr. & P. 575; 2 J. J. Marsh. 380.*

The rule seems to be almost without exception that occupancy must accompany the statements.—*Jackson v. Vredenburgh, 1 Johns. 158; Church v. Burghardt, 8 Pick. 327; Reed v. Dickey, 1 Watts, 152; Norton v. Pettibone, 7 Conn. 319; Jackson v. Murray, Anthon, 105; Inhabitants of West Cambridge v. Inhabitants of Lexington, 2 Pick. 536; May v. Jones, 4 Litt. 21; Jackson v. Meyers, 11 Wend. 533; Hall v. Gittings, 2 Har. & J. 380; Little v. Libby, 2 Greenl. 242; Smith v. Martin et al. 17 Conn. 399; Hannon v. Pettitt, 5 Barn. & Adol. 223; Carne v. Nicoll, 1 Bing. N. C. 430; Doe dem. Manton v. Austin, 9 Bing. 41; Doe dem. Baggaley v. Jones, 4 Campb. 367; Greenl. on Ev. §§ 189 and 109.*

A few cases have held the contrary, but they have been afterwards given up by the courts which decided them.—*1 Phil. on Ev. (C. & H. notes), 196.*

And some authorities limit the statements to the time of entry.—*Brabaker v. Poage, 1 Monroe, 125.*

4. It was an error to permit the witness Antoine Vermet to testify to the motives of Dominique Riopelle in wishing the Larribel house torn down. This is the fourth assignment.

While the actions or declarations of a party in possession are clearly admissible as qualifying such possession, we submit a witness cannot testify to the motive which influenced such acts or declarations. The motive is to be found by the jury from the actions and declarations. It is for them to say whether such words or deeds evince a claim of title or not.

5. The tax deed was improperly excluded. The objections to its introduction were:

1st. The description was too general, in that while it purported to convey all that part of the private claim east of

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the north branch of the Ecorse river—which was some 160 acres—it limited the amount to $20\frac{74}{100}$ acres.

We reply to this:

a. The description is limited to that part of the claim east of the north branch of the Ecorse river in Township 3, S. of R. 11 E. and this is about one-half of that part of the claim lying east of the north branch of the Ecorse, or about 80 acres.

b. But the principle is the same whether 80 or 160 acres, and we say, the description would be complete if the words "containing $20\frac{74}{100}$ acres more or less" were omitted. These words cannot limit the amount to $20\frac{74}{100}$ acres.

In construing deeds, effect will be given to every part of the description if practicable, but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances in the description are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will be rejected as mistaken.—*Jackson v. Moore, 6 Cow. 717; Emerson v. White, 9 Fost. 499; 2 Parsons on Cont. 26, 62 and note; Broom's Leg. Max. 403, 409; Anderson v. Baughman, 7 Mich. 77; Cicott v. Gagnier, 2 Mich. 381.*

This tax deed purported to convey all that part of private claim 61 lying east of the north branch of the Ecorse river, in township 3, S. of R. 11 E. This was capable of positive location. The $20\frac{74}{100}$ acres and the one acre in dispute lie in this tract of 80 acres somewhere. The record, then, we say, was notice to plaintiff when he took his deed from Dominique, July 1, 1848, of the real land intended to be covered by the tax deed.—*Cooper v. Bigley, 13 Mich. 463.*

2. The second objection to the introduction of the tax deed was, that the description was not in accordance with the statute relative to the assessment and collection of taxes.

We insist it was. The deed was given November 30, 1846, based upon a tax sale made October 6, 1845, for delinquent taxes for the year 1843.

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The taxes were assessed then under the act of March 8, 1843, which took effect March 18th, 1843. By the provisions of sec. 12 of this act, the assessments were required to be made between the third Monday of April and the fourth Monday of May.—*Laws of 1843, p. 60.*

By the provisions of this act the description of real estate is required to be as follows:

When the land was not a government section or subdivision of a section:

"If less or other than any such subdivision, it shall state the name or number of the lot or tract, or by what other lands it is bounded."—*Act of 1843, § 16.*

This deed described the land as "Private Claim No. 61," and came within the requirements of the statute.

3d. The third objection to the tax deed was that Blanchet was himself in possession of the land when the alleged tax title accrued.

The facts do not sustain this objection. The objection is based upon the doctrine as enunciated by this court, that one in possession of lands, claiming title after taxes having become a lien thereon, can acquire no additional interest by suffering the land to be sold for such taxes and becoming the purchaser.—*Lacey v. Davis, 4 Mich. 140; Tweed v. Metcalf, Id. 579.*

But this doctrine has no application to this case. This sale was for delinquent taxes of 1843. Under the act of 1843 the assessment became a lien from the 1st of November of that year (1843.)—*Act of 1843, § 29.*

Blanchet did not go into possession of this land until July 8th, 1845, nearly two years after this tax had become a lien upon the land.

And this tax sale was made October 6th, 1845, about two years after this assessment became a lien, and only three months after Blanchet had acquired title, and gone into possession.

Hence we say, Blanchet was a stranger to this land

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when the tax was assessed—when it became a lien—when it was returned as delinquent to the Auditor General—when it was sent back for sale to the County Treasurer—when it was bid in by the state—when the time of redemption expired, and when it was sent back to the County Treasurer a second time for sale.

So the reason of this doctrine, which has its foundation in the obligation of a person to pay taxes on property in his possession, and which he claims to own, fails.

If the tax deed was admissible, it was a complete bar to plaintiff's recovery. By the statute passed in 1842, plaintiff's action is barred if not brought within ten years. —*Laws of 1842, p. 133, §§ 1 and 2.*

This act is by special enactment made applicable to the law of 1845.—*Laws of 1845, p. 82, § 16.*

Plaintiff's right of action accrued July 8th, 1845, when Blanchet, under whom defendant claims, went into possession. This ten years' limitation was not repealed until the Revised Statutes of 1846 took effect, which was March 1st, 1847.

This action, not having been brought within ten years after entry and possession under color of tax title, is governed by the act of 1842.—*Perry v. Hepburne, 4 Mich. 165.*

C. N. Riopelle, and *Levi Bishop*, for defendant in error.

1. The documentary evidence, from the General Land Office at Washington, was proper and sufficient in form.

This evidence, in regard to the private claim in question and of the adjoining claims, was offered for the purpose of fixing the boundaries of the claims; and no objection was made to it, except with reference to the form of its authentication.

The certificate is a printed form, which has been in use for all purposes of evidence, ever since the departments of the Federal Government have had existence.

The document, taken altogether, is a regular, legal

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exemplification, technically, so called, and it therefore imports absolute verity. It imports, in the language of the certificate itself, that it is a true, a literal, and a perfect copy of the papers, and of the whole of the papers exemplified. It would not be an exemplification unless it had this import and effect: such is the rule of evidence on the subject. — *1 Greenlf's Ev. 501; 1 Bouv. Law, Dic. 499; 1 Starkie Ev. 189; 1 Phillip's Ev. 384.*

These documents, thus certified from the several Departments at Washington, are expressly authorized by several acts of Congress, and are declared to be evidence in all courts of justice the same as the originals would be if produced.

As to the *State Department.* — *Act of Sept. 15, 1789, 1 Statutes at Large, 69; Cited note a, on page 267 of Brightly's Digest.* As to the *General Land Office.* — *Act of April 25, 1812, 2 Statutes at Large, 716; Brightly, p. 462, § 3, 463, § 9, 464, § 26; Same, 463, § 9.* As to *Land Titles* especially.—*Act of January 23, 1823, 3 Statutes at Large, 721; Cited, § 14, on page 267 of Brightly.* As to *Treasury Department.*—*Act of Feb. 22, 1849, 9 Statutes at Large, 347; Brightly 267, § 16. War, Navy, Attorney General* and *Post Office* Departments. — *Brightly, § 7, p. 267. Department of the Interior.*—*Act of May 31, 1854, 10 Statutes at Large, 297; Cited, Brightly 267, in Note.*

Such being the law of the United States, what has the statute of this state to do with the subject?

The objection to this evidence seems to have been based on *§ 71, p. 458, of R. S. of 1846; 2 C. L. Art. 4,308.*

The statutes of this state cannot control Federal legislation upon the subject.

Upon an examination of *§ 71* and what follows, it abundantly appears that it has reference solely to documentary evidence created and existing in this state; or if it was intended to have reference to extra territorial evidence, it could only have been intended to provide for cases where

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the law did not otherwise provide for the authentication of such evidence.

It is further to be observed that the papers in question do not derive their character as evidence from the laws of Michigan. They would have been evidence if no such institution as the State of Michigan had existed.

2. The question put to the plaintiff below as to the value of the land in 1845, was clearly competent under the theory of the case, which we sought to establish.

If the forty acres was worth $1,000, the jury might well infer that Blanchet, in paying but $100, was buying only a leasehold interest, instead of a fee as claimed by the defendant below.

3. The conversation between Joseph and Antoine Vermet, which we showed by Alexander Riopelle, was not in the nature of an admission made by a person in possession, or by parties to the record. Such was not its character at all.

The testimony was introduced to show that Joseph Vermet, under whom the defendant claimed, went on to the place in question, under an express agreement, as the tenant of Dominique Riopelle, from whom we derived the title.

If the defendant, or those under whom he claimed, went on to the place as a tenant of him from whom the plaintiff claimed, he and they could not dispute our title, even if we had none; and this was what this testimony tended to prove.—*Taylor's L. and T.* §§ *89, 91; Angell on Lim.* § *442.*

4. The testimony as to tearing down the house partly built by Larabelle, was to show an act of ownership by Dominique Riopelle in pursuance of his claim of title. This was competent in connection with our testimony that Dominique claimed to own the farm, and leased it to Joseph Vermet, under whom the defendant claimed.

Occupancy and acts of ownership on even a part of a tract of land are evidence tending to show possession of the whole.—*2 Bouv. L. D. 351,* § *45; Elliot v. People, 10*

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Peters, 413, 442, 3, 4; Moss v. Scott, 2 Dana, 275 and cases cited; 1 Cow. 286; Jackson v. Vermilyea, 6 Id. 681.

5. The tax deed, dated in 1846, for the tax of 1843, was given to Blanchet.

a. The first objection to it is that Blanchet was in the occupancy and possession of the land from 1842 to 1852, covering the whole time of the accrual of the tax title, claiming title, according to the theory and case of the defence, from Joseph Vermet and wife. The tax title is therefore bad under the decisions of this court. — *Lacey v. Davis, 4 Mich. 140, 150; Tweed v. Metcalf, 4 Id. 579, 586.*

If a party who enters on land after a tax has become a lien upon it, cannot, by bidding it off at the tax sale, acquire a cumulative title, much less can he do so, who is in possession during the whole time, back, even prior to the assessment.

b. The ten years' limitation provided by section 2 of the act of 1842, page 133, does not apply to the case, because the defendant or those under whom he claims, did not enter under, or in pursuance of, the pretended tax title. And besides, that act was repealed, without reservation by the revised statutes.—*R. S. 1846, p. 732.*

The tax title is bad, generally.

c. It appears that the whole farm contains two hundred and twenty acres; that it crosses the river Ecorse diagonally; that Blanchet occupied a small part fronting on the Ecorse in 1843; and that in 1845 he took a deed from Joseph Vermet of two acres wide and forty acres deep.

It must be assumed from the deed that the assessor intended to assess a tract one acre wide and twenty acres deep, but whether it was the twenty in question, or the other twenty bought by Blanchet, or the twenty which lies alongside of them, must be left to conjecture; and in making the assessment he purports to include one hundred and sixty acres in the same description; being at least one

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hundred and twenty acres more than Blanchet ever pretended to own.

Such uncertainty is enough to defeat any paper which is relied on as the source or as part of a chain of title.—*F. M. Society v. Detroit, 3 Mich. 172, 184.*

d. In order to constitute a good assessment and deed in the case, the presumption being that the description in the assessment is carried into the deed, the land ought to have been assessed by its name and boundaries, as required by the fourth subdivision of section 16.—*Sess. L. 1843, p. 66.*

In no other way, could a valid assessment be made of any part of this private claim, under the law then in force.

6. The offer to prove the custom among the "old French settlers, as to giving away their farms to their oldest sons," was incompetent. We are not informed whether it was the *coutume de Paris,* or the *coutume de Normandie,* or the *coutume de l' Ecorce,* which it was proposed to prove by the witness. Nor is it very clearly defined as to what "old French settlers" were referred to by the question; whether those of Acadia, or Montreal, or Mackinaw, or Detroit, or some other part of La Nouvelle France.

The ordinance of 1787, as to the descent and distribution of the property of intestates; and as to the disposition of property by wills, in writing; and as to the transfer of property by deed, under seal, must prevail. — See *§ 2 of the Ordinance.*

Or the acts on the same subject, to be found in the codes of 1820, or 1827, or 1833.

COOLEY CH. J.

The exceptions to the rulings of the Circuit Judge, upon which the plaintiff in error insists in this court, will be noticed in the order in which they appear in the record.

The action was ejectment, brought by Riopelle to recover two parcels of land, the one containing twenty acres and

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seventy-four one hundreths of an acre, and the other one-half an acre, in private claim sixty-one, in the township of Ecorse, both of which parcels lie east of the north branch of the Ecorse river, and between the river and the northern line of the surveyed township number three south of range number eleven east. The plaintiff (below) had no paper title, but claimed the land by long continued possession derived from Ambroise Riopelle, to whom the claim was originally confirmed. No evidence was given in the case to show that the land was ever patented to any one, and it was conceded by counsel on the argument, that it never had been.

I. To show the confirmation of private claim sixty-one to Ambroise Riopelle, the plaintiff introduced a document from the General Land Office, as follows:

"Extracts from field notes of Aaron Greeley, surveyor of private claims 1809."

"No. 29 River Rouge, description No. 118, confirmed to Francis Trudell, commencing," &c. [Here follows description in full.]

"No. 30 River Rouge, description No. 61, confirmed to Ambroise Riopelle, commencing at a post standing on the south border of the River Rouge, between this tract and a tract confirmed to Francois Trudell, thence south twenty-nine degrees west two hundred and forty-nine chains and ten links to a hickory tree, standing in the line of St. Comb, thence north seventy degrees, thirty minutes west, eight chains, eighty-four links to a post, the southwest corner of a tract confirmed to Louis Visieve, thence north twenty-nine degrees east, two hundred and fifty-six chains sixty links, to a post standing on the south border of the River Rouge, thence along the border of said river down stream south thirty-one degrees east, ten chains eight links to the place of beginning, containing two hundred and twenty acres and seventy-four hundreths of an acre. Detroit, 6th December, 1809. Aaron Greeley, surveyor of private claims."

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"No. 31 River Rouge, description No. 119 confirmed to Louis Visieve, commencing" &c. (Here follows description in full.)

GENERAL LAND OFFICE, April 11, 1866.

I, James M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed plat and field notes are true and literal exemplifications of the plat and field notes of Claim No. 61 on file in this office.

Seal of U. S. Gen'l Land Office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

J. M. EDMUNDS,
Commissioner of the General Land Office.

A copy of the plat of private claims on the River Rouge, showing claim sixty-one with claim 118 on one side and claim 119 on the other, was attached to this document, but no question arises upon that. The defendant objected to the admission of this copy of the field notes in evidence, because it did not purport to be a true copy of the whole of the original, and because it did not appear to have been, by the person or officer having charge of the original, compared with the original, and to be a true transcript therefrom, and of the whole of such original. The Circuit Judge overruled the objection.

So far as this objection was based upon a variance between the form of the commissioner's certificate and the form prescribed by our statute for the authentication of copies of public documents (*Comp. L.* § *4308*), the ruling of the Circuit Judge was clearly correct. The mode of authenticating the documents, records and proceedings of any of the departments or courts of the United States, is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of the State.—*Lacey v. Davis, 4 Mich. 140.* The form of this certificate is the usual one, and it is sufficient.

A more serious objection arises upon the fact that, while the copy purports to embrace the field notes of claims 118

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and 119, the certificate of the commissioner does not expressly refer to them, but the words employed refer in express terms only to the plat and the field notes of claim 61. It is therefore argued that, so far as the field notes of claims 118 and 119 are concerned, there was no authentication whatever; and this objection appears to me to be well based in fact, whether sufficient in law to exclude the evidence, or not.

It does not necessarily follow, however, that because something is incorporated in such a paper which the certificate does not cover, that the paper is to be excluded even as to the matters which are well certified. If those matters which are not certified are immaterial, and cannot affect the case one way or the other, there is no reason for wholly rejecting the evidence. And even if they might have a bearing in the case, the fact that they are not authenticated may be a sufficient reason why the portion of the document relating to them should not be read, but cannot be ground for rejecting another and entirely distinct and separate portion thereof, which is authenticated in due form.

In the present case, the field notes of claims 118 and 119 are not material or pertinent to the case, except as they may assist in defining the boundaries and identifying claim 61. But whether material or not, the objection of the defendant, which went to the whole document, and not simply to that part of it which related to claims 118 and 119 was clearly, I think, not well taken, and properly overruled. Had he objected to the reading of that portion which related to those claims, and been overruled, we might be required to examine the question whether that portion was material in the case or not; but the objection actually taken being too broad, and covering that part of the paper which was clearly admissible, the question of the materiality of the rest is not, I think, properly before us.

II. The second exception relates to the admission of evi-

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dence offered by the plaintiff, to show the value of the premises in 1845. To understand the ruling on this subject, we must see how the case stood at the time it was offered. The plaintiff had given evidence, tending to show, that before, at and after the evacuation of this country by the English, under Jay's Treaty, in 1796, Ambroise Riopelle exercised acts of ownership over the land in question, built a house thereon, and claimed it as his own; that about 1837–8 or '9, Joseph Vermet went on to the place as a tenant of Dominique Riopelle; that in 1842, Alexander Riopelle went upon it as tenant of said Dominique, and that he, in that year, put Abraham Blanchet on the place, also as said Dominique's tenant, and that while said Blanchet was so in the occupancy thereof, on July 8, 1845, he took a quit claim deed of the lands from Vermet, purporting to convey a fee, at the expressed consideration of two dollars and fifty cents per acre. Through intermediate conveyances, the defendant claimed title under this deed, while the plaintiff claimed that, in 1851, after he had acquired Dominique's title, he let Augustus Vieux have the place as his tenant, and that defendant, as son-in-law of Vieux, occupied the premises under the lease to Vieux, in pursuance of an express agreement with the plaintiff.

This being the position of the case upon the evidence, the plaintiff was allowed, against the objection of the defendant, to show that the value of the premises in 1845 was $25 per acre. The object of this evidence was to raise a presumption, that when Blanchet took the deed from Vermet in 1845, at an expressed consideration so greatly below the real value of the land, it could not have been understood or supposed that he was acquiring the fee thereby, but rather that he was receiving the conveyance of a leasehold interest only.

I do not perceive much force in this evidence, both because the title, being founded only on possession, could hardly be expected to command such a price as it would if

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perfect of record, and also because the consideration expressed in a deed is no very satisfactory evidence as to what the real consideration was which the party paid. The statement of the consideration, however, is open to explanation, and the circumstance that the title is not of record is one to which it is to be presumed the jury will give due weight All the surrounding circumstances which can have any bearing in showing whether Blanchet took possession as tenant or as owner of the fee, ought to be allowed to be put in evidence, and, as having some relevancy, I think it was competent to contrast the real value of the land with the price which Blanchet paid for the title, right or claim which he bought. Standing alone, this fact can have no force whatever in opposition to a deed apparently conveying the fee; but it might have some weight in a case where the other evidence left in doubt the character of the claim which Blanchet made to the land.

III. The plaintiff gave further evidence, tending to show that while Dominique Riopelle claimed the land and exercised acts of ownership over it, and prior to the time when Joseph Vermet went into possession, one Seabrook being then on the land, and Antoine Vermet acting as agent for the plaintiff, Joseph Vermet went to said Antoine and inquired of him, if he would let him, said Joseph, have the land; and that Antoine replied that if he could buy out Seabrook, and Dominique was willing, Joseph might have the land on the same terms on which Seabrook held it. The evidence of this conversation was objected to, but admitted, and we think rightfully.

The defendant regards this evidence as having been admitted to characterize the possession of Joseph Vermet, and as not admissible on that ground, because at that time Joseph was not in possession. This, however, was not strictly the ground on which it was received. The evidence was one step towards establishing a contract between Joseph Vermet and Dominique Riopelle, by which the former would

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become the tenant of the latter; and if such a contract was oral, and was followed by the surrender of possession by Seabrook to Joseph Vermet, it cannot well be claimed the evidence of the negotiations was hearsay evidence. It would be clearly competent to prove such a contract by either of the parties to it, but it would be equally competent to prove it by any other person who was present at the time and heard it.

IV. The plaintiff then proved, by Antoine Vermet, that while Dominique Riopelle exercised acts of ownership over the land, there was a house upon it, supposed to have been built by one Laribell, which witness threw down by order of said Dominique; and he then asked the witness, with a view to show the nature of the act of Dominique, as being in pursuance of his claim of title: "Why did Dominique wish the house thrown down? This question was objected to as immaterial and irrelevant, but the objection was overruled, and the witness replied, "because he wished no one trespassing on the farm. Laribell went on to settle, and I tore it down."

It was entirely competent, I think, to show that Dominique Riopelle caused the house to be thrown down, in pursuance of his claim of ownership, and in order to exclude any claim of possession on the part of Laribell; but this question was not properly framed to call out such evidence, nor was it obtained from the answer of the witness. He is not asked what Dominique said, but what his wishes were; and we do not know from his answer that he had any further means of knowing the purpose of Dominique, in directing the building to be torn down, or his wishes in regard to it, than such inference of motive as any third person might draw from his causing the destruction. It was not competent for the witness to testify to the motive of Dominique, unless, accompanying the direction, the motive was expressed; and this is not shown to have been the case.

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V. The next exception relates to the refusal of the court to receive in evidence a tax deed from the Auditor General to Abraham Blanchet, dated November 30, 1846, and given in pursuance of a tax sale, made October 6, 1845, for delinquent taxes of 1843. I shall notice the objections to this deed as they are made in the brief of the plaintiff.

1. That Blanchet was in the occupancy and possession of the land from 1842 to 1852, covering the whole time of the accrual of the tax title, and that, therefore, the title is bad under the prior decisions of this court.—*Lacey v. Davis, 4 Mich. 150; Tweed v. Metcalf, Ibid, 586.*

This objection is not tenable, because, in the first place, it assumes that the possession of the land by Blanchet during the period in question was an undisputed fact, and there is nothing upon the record to show whether it was so or not. Where a party objects to the evidence on the ground that certain other evidence put in by himself makes it immaterial and incompetent, he must first show to the court that the fact supposed to be proved by such other evidence is not controverted in the case. Otherwise, he is not to assume that it is conclusively established until the jury have passed upon it, and any evidence which is competent on the theory that the jury may find against him, is to be received.

A more conclusive answer to the objection is, the fact that Blanchet's possession, when the taxes accrued, only goes to the validity of the tax deed as a conveyance of the title, and not at all to its admissibility as evidence. The statute under which the deed was given made it *prima facie* evidence of the correctness of all the previous proceedings, and it was, therefore, clearly admissible, however conclusive might have been the other facts which would show its invalidity.

2. The second objection to the deed is based upon a claim which appears to have been made by the defendant that the statute of limitations had run in his favor—he

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having occupied the land ten years under a title derived from Blanchet, the tax purchaser.—*Laws of 1842, p. 133.*

The plaintiff is clearly correct, I think, in claiming that this statute of limitations does not apply in favor of a party who was in possession under some other claim—whatever may have been its nature—at the time of obtaining the tax title. The statute clearly intends that the party who is to have the benefit of the limitation shall enter, or shall have entered, into the actual possession of the lands, under his tax deed; and, if it were otherwise, a wide door would be opened to frauds on the part of persons who, being in possession of lands and bound to pay the taxes, shall attempt to cut off the rights of other persons by buying in the land for taxes which their duty to the public and to such third persons required them to pay. But this again is an objection which goes to the effect and sufficiency of the deed, and not at all to its admissibility.

8. It is insisted that the description in the tax deed is fatally defective. The description is "the following described land, situated in the County of Wayne, to wit: that part of private claim sixty-one, lying east of the north branch of the river Ecorse, in township 3, south of range 11 east, containing twenty acres and seventy-four one-hundredths of an acre, be the same more or less." The record shows that about one hundred and sixty acres of private claim sixty-one lies north of the north branch of the Ecorse, and that the north line of township three north of range eleven east would divide this nearly in the middle. There would therefore be in that part of private claim sixty-one, lying north of the north branch of the Ecorse, and in township three south of range eleven east, something like eighty acres of land. The plaintiff claims that it was clearly the intention in making the tax sale, to sell only twenty acres and seventy-four one hundredths, and that it is impossible to locate this in any particular part of the larger quantity; but inasmuch as definite and permanent boundaries are given, the deed must be

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held to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned. This is on the familiar principle that the incorrect portion of the description is to be rejected where that which remains is sufficient, and that definite and permanent monuments are to control distance and quantity.

The plaintiff also claims that the description in the tax deed was not sufficient for the purposes of assessment, under the tax law of 1843, under which the assessment was made, because, not being "the subdivision of any section authorized by the United States for the sale of public lands," it was necessary, under subdivision two of section sixteen of the Act of 1843—*S. L. p. 66*—to "state the name or number of the lot or tract, or by what other lands it is bounded." In this case the number of the lot, a part of which was sold, is given, and definite and well-known boundaries which at each end separate the part sold from the remainder; and this, I think, complies with the statute. The requirement that it shall be described by the lands which bound it, has reference to those cases in which the tract is not known by name or number, and in which such a description would be most likely to attract the attention of the owner or other person interested in the payment of the taxes when it came to be spread upon the tax roll, or advertised for the purposes of a sale.

I think, therefore, that the objections to the admissibility of the tax deed were not well taken, and that the court erred in excluding it.

VI. The defendant having given evidence tending to show some claim of right to the land on the part of Toussaint Riopelle, the eldest son of Ambroise Riopelle, called Augustus Burdeno as a witness, and, having proved by him that he was acquainted with the custom among the old French settlers as to giving their farms to their eldest sons, asked him this question: "What was the custom among the old French settlers as to giving away their farms to their

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eldest sons?" This question was objected to, and excluded by the court.

The purpose of this question evidently was to raise an inference that Ambroise Riopelle had given to Toussaint, his eldest son, his possessory right to the premises; but however common may have been such gifts among the class of people to whom Riopelle belonged, it is plain that the frequency of the practice could not warrant an inference of a similar gift in any other case where no direct evidence of it had been given. Whether such evidence would have been receivable in support and corroboration of direct evidence, that Ambroise Riopelle had put his eldest son in possession of the land, we need not inquire on this record.

For the rulings, admitting the witness Vermet to testify to the wishes of Dominique Riopelle in tearing down the Laribell house, and excluding the tax deed from evidence, the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Alexander Farwell et al. v. Patrick Fox.

Replevin: Description. Where the writ and declaration in replevin described the property as "six oxen," held sufficient.

Heard April 8th. Decided April 13th.

Error to Sanilac Circuit.

This was an action of replevin for six oxen. The writ and the declaration described them as "six oxen."

The defendant demurred to the declaration, on the the ground that the description was insufficient.

The Court overruled the demurrer, and gave judgment for the plaintiff.

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Wm. T. Mitchell, for plaintiff in error.

The description of the property replevied was insufficient in both the writ and declaration. The description being "six oxen," without any other statement that would tend to distinguish the six taken from any other six oxen in the township or state.

"The writ should, on its face, contain such a description of the goods as would enable the sheriff with reasonable certainty to distinguish them from other property of a like nature." — *Stevens v. Osman. 1 Mich. 92; DeWitt v. Morris, 13 Wend. 496; Root v. Woodruff, 6 Hill, 424.*

"A declaration in replevin must state a place certain within the village or town."—*10 Johns. 53.*

In this case there is nothing in the writ or declaration to indicate to the Court or officer executing the writ what six oxen were to be taken under it, unless it is considered that the allegation in the affidavit that six oxen were unlawfully detained by the defendants, is sufficiently definite. But the defendants, having in their possession more than six oxen, would leave the officer very much in the dark in regard to the particular cattle intended.

Although our statute does not require the particular place in the town to be stated, it does not do away with the necessity of a full description, so as to point out and designate the property from other of like kind and nature. If the particular case is essential to the description, then it is necessary. When the place is not required, the description should be more particular.

Divine & Wixson, for defendant in error.

The only question in this case is whether the property was sufficiently described. The special cause of demurrer as set forth in the demurrer and assignments of error is that the "Declaration contained no proper or sufficient description of the property replevied."

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FARWELL ET AL. V. FOX.

1. In replevin the writ and declaration set forth the property claimed whether replevied or not; neither the writ nor declaration show that any property is replevied. If the officer actually replevy property other than that described in the writ (and declaration), that fact cannot be cause for demurrer.

2. The writ is in accordance with the requirements of the statute, and is as full and definite as the precedents. —*2 Comp. L. § § 5010, 5011; Green's Pr. 70, 71; 3 Burrill's Prac. 4, 496; 6 Halst. 79.*

Its sufficiency could not be questioned by demurrer, but only by motion to set aside for irregularity.—*Green's Pr. 439, § § 1262, 1263; 1 Burrill's Pr. 474.*

3. It was only in case of a taking as a distress, (the original use of the action), when the property was already in the custody of the law at a place of which the owner had notice, that it was necessary to disclose a place certain as that where the property was detained.—*3 Black. Com. 13; 2 Burrill's Pr. 13.*

It has been held unnecessary in this country, in case of a wrongful taking, and is clearly unnecessary, in all cases under our statute.—*1 Browne, Pa. 60; Comp. L. §5029.*

4. Reasonable certainty in the description is all that is required.—*2 Burrill's Pr. 13; 1 Chitty on Pl. 165; Root v. Woodruff, 6 Hill, 418; Comp. L. § 5028.*

a. The name, number or quantity and value constitute a sufficient description, and it is only in the absence of such a description that the property need be otherwise identified. This is all that is decided by the cases on which we suppose plaintiff in error relies.—*Stevens v. Osman, 1 Mich. 92; DeWitt v. Morris & Platt, 13 Wend. 496.*

In the case of Stevens v. Osman stress is laid on the fact that the action is for a wrongful detention; but under our practice there is no distinction between replevin for a wrongful taking, and that for a wrongful detention. *Comp. L. § § 5010, 5012, 5028; Trudo v. Anderson, 10 Mich. 357.*

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b. In this case the description is sufficient and is fully warranted by the precedents. — *Stephens on Pl. 43, 44; 3 Burrill's Pr. 296, 297; Id. 496; 6 Halst. 79; Ruch v. Morris, 28 Penn. 245; Root v. Woodruff, 6 Hill, 418.*

By the giving of the bond under the statute, after the property is taken by the officer and appraised, and before delivery to the plaintiff, the defendant is fully indemnified. A mistake by which property, not the subject of controversy, should be replevied, would be fatal to the plaintiff's case. His interest is, therefore, so direct that he may be safely trusted to point out the property described in the writ.

COOLEY CH. J.

Since the case of *Stevens v. Osman, 1 Mich. 92*, a very strict practice has prevailed in this state regarding the description of property in replevin suits; and we were at first not disposed to unsettle that practice by going back to that which prevailed before. A little reflection, however, has satisfied us that the rule, as generally understood, is needlessly stringent, and that no good purpose is subserved by requiring a more particular description than has been given in this case.

The case of Stevens v. Osman is authority only for holding that in replevin for grain or other chattels defined by measurement, a description indefinite in point of quantity, and not otherwise made certain, is fatally defective. The present case does not fall within that ruling. What the Court say concerning the necessity of the writ containing such description of the goods as will enable the officer to distinguish them from other property of a like nature, has reference to the indefiniteness there appearing, and can be applied to cases like the present, only so far as the supposed defect in the description produces a similar difficulty of identification.

It is impossible, in most cases, to give such description

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of property as will absolutely separate and distinguish it from all other property of a similar nature. The number and specific names of chattels can be readily given, and in most cases other characteristics can be mentioned; but they would only tend to reduce the number of similar chattels which would fall within the description, and would not absolutely distinguish the articles demanded from all other chattels. In replevin for these oxen, for instance, if the plaintiff had described them as red oxen, he would have specified a characteristic, which would preclude the writ being applied to animals of a different color, but he would nevertheless have only defined the class to which those which are the subject of the suit belonged, and the description would be only one degree less indefinite than if the color were not mentioned. Nevertheless such a description would probably not be objected to as insufficient, though it is apparent that it would be impossible for the officer from this alone to distinguish and take possession of the property intended. In practice he is not usually expected to do this, but the plaintiff, or some one on his behalf, is present at the seizure, and points out the articles to which the affidavit relates. The defendant has no interest in a more particular description than appears in this record; and as the only result of demanding more particularity would be to subject parties to bills of costs where they had only followed the usual books of precedents, we think it proper to affirm the judgment of the court below, which held the declaration sufficient.

The other Justices concurred.

The Grand Trunk Railway Co. v. Richard I. Nichol.

Evidence: Agency: Province of Court. A person in the employ of the Grand Trunk Railway Company as station agent at Port Huron, in a suit for extra services, testified under obection as to what one Christie, another agent of the company, had told him would be done in case he performed certain extra duties.

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THE GRAND TRUNK RAILWAY CO. *v.* NICHOL.

At this stage of the case there was no evidence that the agency of the said Christie extended to the said subject matter.

Held, the testimony was incompetent.

Where the testimony in a cause fails to make a case of liability against the defendant within the issue, it is the duty of the court to so instruct the jury.

Heard April 9th. Decided April 13th..

Error to St. Clair Circuit.

This was an action of assumpsit brought to recover the value of alleged services rendered the Grand Trunk Railway Company by one of its agents.

Upon the trial, the plaintiff was sworn as a witness, and testified as follows:

I entered the service of defendant in May, 1856. In the latter part of 1859 or early part of 1860, I came to the Port Huron station. I continued in employ of defendant from May, 1856, to October 31st, 1862. I was station agent at Port Huron. My salary was sixty dollars per month. Mr. Bailey called on me and said it was contemplated to remove the agent at Sarnia, and put the Sarnia and Port Huron stations under one management, and suggested to me to take the position. I told him I had all I could do at Port Huron. Mr. Christie afterward spoke to me about it. He was superintendent of the division of the road between Toronto and Detroit.

Q. What did Mr. Christie say to you about it?

Objected to by counsel for defendant as irrelevant and incompetent, being merely hearsay. Objection overruled and exception taken.

A. Mr. Christie said the Manager had set his heart on it, and wanted me to give it a trial; that if it succeeded to his satisfaction, the salary would be made all right. I told Mr. Christie what Bailey had said to me; Christie was superintendent from Toronto to Detroit. On these assurances of Mr. Christie, I accepted the position and discharged the duties for ten months.

Q. What salary had you been receiving up to that time?

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Objected to as irrelevant and immaterial. Objection overruled.

A. I received $60 a month. After this I was paid 6\frac{66}{100}$ a month more. I had been promised this before for my duties at Port Huron. It had been ordered, I think, in December, 1861. Thereafter I received 66\frac{66}{100}$ a month until I left.

Q. What were the services on the Sarnia side worth per month from January until November?

Objected to as irrelevant and not admissible under the declaration. Objection overruled.

A. Worth as much as on the Port Huron side. The entire service was worth $110 a month. I so stated in my account with Mr. Brydges, after I left. I discharged the same duties on the Sarnia side which Holmes, my predecessor there had performed.

(Counsel for the plaintiff thereupon read to the jury, under objection, certain letters written to him by said Christie upon the subject matter.)

I know Mr. Bailey well. He was assistant General Manager of the road. At the time he made the proposition to me which I have spoken of, he said that my salary would be made all right. I told him that my duties were then quite heavy and I should hesitate to accept the position unless upon an increase of salary. This was in the latter part of October or first part of November, 1861. I afterwards repeatedly talked with Mr. Christie about this matter, nearly every month while I remained. I talked with no one else about it except Mr. Brydges. I expressed dissatisfaction to Mr. Christie that my salary was not increased as it should be, and he said each time I spoke to him about it, that there were objections at Montreal which he thought would be overcome by another month, and so it went on. These promises were not fulfilled up to the time Mr. Brydges assumed the management, which was in the summer or fall of 1862.

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On cross-examination the witness said:

The addition to my pay was first received for the month of January, 1862, after my talk with Bailey. They increased it $\$6\frac{66}{100}$ per month. Christie used to employ men. That was the first month I discharged the duties on the Sarnia side. It was my duty to make out the pay-rolls each month for the men under me and for myself. I made and certified them as correct. After I entered upon the Sarnia duties, I divided my salary on the pay-rolls equally between Port Huron and Sarnia. The Sarnia half was paid in gold. (The pay-rolls from January, 1862, to November, 1862, inclusive, were here shown to the witness and identified by him.) These pay-rolls are in duplicate for each month—one for Sarnia men and one for Port Huron. The first name on the right-hand margin of these pay-rolls is mine, and was written by myself in each instance except those for April and July, and my name on those was written by another who had my authority. The signature to the certificate of each pay-roll is mine. I understand that Mr. Brydges possessed the authority to fix all salaries. I did not write him about my salary until after I was discharged. Mr. Christie assured me almost every month that he would see that my salary was made right the next month. During this time, Mr. Jamison was paymaster, and Mr. Sanderson was auditor. Mr. Christie, I believe, is dead, and I don't know where Mr. Bailey is. After I left, they went back to the old system of an agent at each station. They did not charge me house rent.

On re-direct examination, the witness said:

I divided my pay between Port Huron and Sarnia at the suggestion of Mr. Christie.

Thereupon, without introducing further evidence, the plaintiff rested.

The defendants, to maintain the issue on their part, introduced, as a witness, William H. Jamison, who testified as follows:

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In 1862 I was in the employ of defendant as paymaster from Montreal, west. I paid the plaintiff every month. Mr. Christie is dead. I knew him, when living, in the employ of defendant. He had charge of the traffic department from Toronto to Detroit. He employed agents who had to be approved by the General Manager. Mr. Shanley was General Manager during the early part of the year 1862, and in the summer or fall was succeeded by Mr. Brydges. The General Manager had entire control of the fixing of salaries of station agents. Mr. Christie had no authority whatever, and, so far as I know, did not assume to have.

On cross-examination, the witness said:

Mr. Nichol spoke to me once or twice complainingly about his pay being less than it should be, but I never heard that he was promised more until now. I have no recollection that he ever told me so.

S. E. Martin, a witness on the part of the defendant, testified as follows:

I am assistant superintendent between Port Huron and Detroit. Have been in the employ of the company a number of years. I knew Christie. He was superintendent of the road between Toronto and Detroit. His duties were considerably limited. Neither he nor any other superintendent had authority to fix the salary of station agents. That was entirely within the control of the General Manager. The superintendent may recommend an increase of salary, but he cannot establish it.

The counsel for the said defendant requested the Circuit Judge to instruct the jury—

1. That the testimony in the cause failed to make a case of liability against the defendant within the issue, and their verdict must be for the defendant.

The Circuit Judge refused so to instruct, but charged the jury that if they should find that the defendant, by an authorized agent, promised the plaintiff that in con-

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sideration of his taking charge of the Sarnia station he should be paid whatever it was worth, defendant was liable to the amount of the value of such service as shown by the testimony. Exception taken.

The Circuit Judge further instructed the jury that there was no evidence in the case from which the law would imply a promise of the defendant to pay the plaintiff anything for his services at Sarnia, but that they must find there was an actual promise by the defendant to pay him for such service in order to find a verdict for the plaintiff.

The jury rendered their verdict for the plaintiff, and assessed his damages at the sum of five hundred and ninety-six dollars and sixty-two cents.

Wm. T. Mitchell, and *E. W. Meddaugh*, for plaintiff in error.

1. The plaintiff having failed to prove that Christie was an agent of the company, authorized to contract with or fix the pay of agents or other employees of the company, any conversation with him and statements by him, were entirely irrelevant to the issue.

Mr. Christie had no authority to bind the company in that respect.

To make his statements or agreements evidence, his authority must first be proved, beyond doubt, as to his authority.

There is not the slightest proof that Mr. Christie was the agent of the company to contract with the plaintiff below.—*Bank of Baltimore v. Bateman, 7 Har. & Johns. 104.*

2. The proofs submitted to the jury did not make out a case against the company. Hence the court erred in refusing to charge the jury as requested, "that the testimony in the cause failed to make a case of liability against the defendant, within the issue, and that their verdict must be for the defendant."

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This refusal was equivalent to charging the jury that there was proof authorizing the plaintiff to recover. The judge should have stated the law upon the facts proved.

"Each party has a right to have the law stated correctly to the jury, on the facts as he claims them to have been proved, when testimony has been given tending to sustain his views of the proof.—*Whitney v. Lynde, 16 Verm. 679.*

It is the province of the court to determine whether the evidence conduces to prove the issue; and if the plaintiff wholly fails to make out his case, the court may instruct the jury to find for the defendant.—*Perry v. Clark, 5 How. Miss. 495.*

The court may in all instances inform a jury that there is no evidence, or no evidence sufficient in point of law, to establish a fact sought to be proved.—*Farmers Bank v. Duval, 7 Gill & Johns. 78; Roach v. Hulings, 16 Pet. 319; Wisner v. Davenport, 5 Mich. 501; Hill v. Ward, 2 Gilman, 285; Paschal v. Davis, 3 Kelly, 256; Ivey v. Phifer, 11 Ala. 535; Harris v. Woody, 9 Miss. 113; Powers v. Ingraham, 3 Barb. 576; Bradley v. Grosh, 8 Id. 45.*

The evidence in this case was not in any sense legally sufficient to establish the agency or authority sought to be proved.

3. There was no evidence of any promise or undertaking to pay plaintiff any additional sum, or what his additional services would be worth, even if Bailey and Christie had full authority to bind the company in that respect.

The utmost effect of all Christie's promises was that he would do all he could to get additional compensation allowed.

Conger & Harris, for defendant in error.

But two errors are assigned.

1st. That the court erred in permitting the question to be asked and answered:

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"What did Christie say to you about it?"

It was said on the trial that this question was "irrelevant and incompetent, being merely hearsay."

Hearsay, in its legal sense, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person.—*1 Greenlf. on Ev.* § *99.*

We submit that the evidence objected to, does not come within this or any other legal definition of the term, hearsay.

The testimony was as to a distinct fact, viz: a proposition to unite the management of the two stations, Sarnia and Port Huron.

But Christie was superintendent of the division of the road which includes these two stations. He was agent of the company, and we claim that whatever the agent did in the lawful prosecution of his business, is the act of the principal.

The agent's statements are of the nature of original evidence, and not of hearsay.—*1 Greenlf. on Ev.* § *113.*

But suppose the answer to be stricken out, or had been ruled out on the trial.

We claim that it could have made no possible difference with the result, for there is an abundance of testimony to warrant the verdict aside from that answer.

The admission of evidence from which no injury could result to the plaintiff in error is no ground for reversing a judgment.—*Minnesota Mining Co. v. National M. Co. 11 Mich. 186; Rose v. Lewis, 10 Id. 483.*

An erroneous charge (and why not an erroneous admission of evidence) which could not affect the verdict, is no ground of error.—*Cummings v. Stone, 13 Mich. 70; Clark v. Moore, 3 Id. 55.*

The corporation, by its agents, knew that the work was being done (and a corporation can only work through its

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agents), and we may safely rely upon the implied promise of the company to pay for the services rendered.

It is for the jury to determine whether there was an implied promise or not.—*Strong v. Saunders, 15 Mich. 339.*

2. The second error assigned, is, that the court erred in refusing to charge "that the testimony in the cause failed to make a case of liability against the defendant within the issue, and their verdict must be for the defendant."

If there was any evidence whatever that tended to make out the case, the defendant in error had a right to have it considered by the jury. The weight of evidence is for them to consider, and not the court.

The court cannot compel a plaintiff to become nonsuit. He has a right if he chooses to go to the jury with his case.—*Cahill v. Kalamazoo Ins. Co. 2 Doug. 124; 14 Mich 139; 15 Id. 332.*

GRAVES J.

In the fall of 1861, Nichol, the defendant in error, was in the service of the company as station agent at Port Huron, and was receiving $60 per month. While thus engaged, he was requested by two agents of the company, Bailey and Christie, to take charge of the Sarnia station also, and complied.

Neither Bailey nor Christie had or pretended to possess any authority to fix or change the salaries of station agents, and their want of power in this respect was well known to Nichol.

When it was proposed to him to act at Sarnia as well as Port Huron, some conversation took place respecting an enlargement of his salary, but nothing definite was said about it, nor did any one assume to guarantee any change in his compensation.

Under these circumstances, Nichol proceeded to act as agent for Sarnia as well as Port Huron, without any stipulation beforehand for an increase of pay. He con-

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tinued, however, to agitate the subject of enlarging his salary, and obtained the intercession of Bailey and Christie; and finally the company, in January, 1862, raised his wages $6.66 per month.

After this change of wages and for about ten months, at the end of which time he was discharged by the company, the defendant in error regularly made out and receipted his monthly pay roll, in which he charged the company $66.66 for his month's services at both stations, one half for each, and receipted the same.

After his discharge he sued the company to recover an additional compensation for his ten months' service, and obtained judgment for $596.62 and the company now seek a reversal of that judgment.

There are but two points in the case.

On the trial, the counsel for Nichol asked the latter, while testifying in his own behalf what the agent, Christie, said to him about taking the Sarnia Station, which was objected to as calling for hearsay testimony, but the objection was overruled, and this presents the first question.

When this ruling was made, Nichol had testified that Christie, at the time of the conversation referred to, was an officer of the road, but it had not been shown in any way that his agency extended to those affairs to which the talk inquired about, related. Subsequently, it was conclusively established by the testimony of Nichol and Jamieson, that Christie had nothing to do with the adjustment of the salaries of station agents. It seems, therefore, that the question was open to the objection made to it, and should have been disallowed.

After the evidence had been given, the Court was requested, by the counsel for the company, to instruct the jury that the testimony failed to make a case of liability against the defendants within the issue, and that the verdict must be for the defendants.

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The refusal to give this instruction presents the second, and only remaining question in the case.

It appears by the record that all the evidence given on the trial is embodied in the bill of exceptions, and an inspection of that evidence is sufficient to show that there was nothing whatever to prove that an express contract was made with the company for any greater compensation than Nichol received.

While there was no testimony tending to prove an express engagement, the evidence, in so far from justifying an inference that the company were to pay anything beyond $66.66 per month, actually repels such an inference, and emphatically excludes the idea of an implied contract for additional wages. Being in the service of the company for a fixed compensation, his duties were enlarged and he asked for an increase of pay and obtained it. He continued at work thereafter until dismissed by the company, and every month stated his demand according to the increased rate, and, on getting the money, receipted the claim.

He may have beguiled himself with an expectation of further compensation, but there was no ground for anything more substantial than an expectation according to this evidence.

As there seems to have been no conflicting evidence, nor any dispute as to what actually occurred, and no view which the jury were at liberty to take, could have supported the case of the plaintiff, I think there was error in refusing to charge as requested, and that the judgment should be reversed, with costs.

The other Justices concurred.

Daniel Van Valkenburg et al. v. Elizabeth Rogers, Administratrix.

Contract: Evidence: Duty of Court. For the purpose of establishing a contract for the hiring of a certain boat, the plaintiff offered a letter directed to defendant,

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in which he offered to charter the defendant's boat on specific terms. The defendant replied, by letter, in substance, that he would not like to charter the boat in the manner desired, but preferred to place the tug under plaintiff's control as regarded rates of charges, etc.

To this, plaintiff replied by letter, that he thought favorably of the plan, but desired to have some definite understanding as to what he was to give to defendant, and wished defendant to telegraph him, and whatever he wanted done regarding a bargain, he could do through a Mr. Westover.

Defendant telegraphed plaintiff March 17th, to commence fitting up the boat. Plaintiff thereupon took possession of the boat, fitted her up at his own expense, and used her until the following September, when plaintiff took possession of her.

In an action of Trover, the court charged that the several letters and telegram constituted a contract and entitled the plaintiff to the use of the boat during the season.

Held, that while it was the duty of the court to tell the jury what the correspondence contained, and what it meant, the court erred in determining that said correspondence constituted a contract. While it showed that the parties had begun to make a bargain, it also showed that no bargain was completed.

Heard April 10th. Decided April 13th.

Error to Bay Circuit.

This was an action of trover brought to recover damages for an alleged conversion of special property in the steam-tug Union.

Upon the trial, the plaintiff offered in evidence certain letters and telegrams, of which the following are material portions:

"BAY CITY, February 26, 1866.

MESSRS. D. A. VAN VALKENBURG & SON:

GENTS—I wish to know if you would charter your tug Union for the coming season. I would fit her out well and pay for such outfit and pay you two thousand dollars for such charter, as follows: Five hundred dollars on the first of June, 1866, five hundred dollars on the first of August, 1866, five hundred dollars on the first of October, 1866, and five hundred dollars on the first of December, 1866; and on laying her up would guarantee her clear of all claims which might accrue while under such charter. Could use her in connection with the tug Wave much better than alone, and would do your towing as reasonable as you could get it done otherwise. Please let me hear from you soon.

Respectfully, &c., H. B. ROGERS.

LOCKPORT, March 7, 1866.

MR. H. B. ROGERS:

DEAR SIR—Yours of the 26th of February was duly received and contents observed. You make us an offer for the charter of the tug Union. We would not like to charter the tug in just the manner

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that you state it. We will put the tug under your control, except for what little towing we have for ourselves, so that you can control the matter as you think best at a reasonable rate, so that you can take the entire management of the matter. I think by putting them together will be a benefit to both parties. You can rely on us to do anything that is right in the matter. If you think well of the plan, please write soon, and let us hear from you what you think about it.

Yours Respectfully, D. A. VAN VALKENBURG & SON.

BAY CITY, March 12, 1866.

MESSRS. VAN VALKENBUGH & SON:

GENTS—Yours of the 7th inst. is at hand. I think favorably of your plan, and will take tug Union with the understanding that your towing is to be done at any time that you may call for it, but would like to have some definite understanding about what I am to do, or about what I am to give. If you know about what amount of logs you have to tow, please state how much I shall pay you besides doing your towing. It is high time that fitting and repairing had commenced. If I take her, painting and repairing should commence this week, and I would like to have you telegraph as soon as you get this, because nearly every other boat is ready to come out as soon as the ice clears from the river. I will do just as I agree, and as the season is far advanced, and little time left in which to make repairs, and it seems a long time to wait for an answer by mail, I think it would be best to let me hear from you by telegraph, and whatever you want done in relation to a bargain perhaps you could have it done through Mr. Westover, after informing him what you want.

Respectfully, H. B. ROGERS.

TELEGRAM.

LOCKPORT, N. Y., March 17, 1866.

To H. B. ROGERS, Esq., Bay City, Mich.:

You can commence fitting up the tug Union.

D. A. VAN VALKENBURG & SON.

It was admitted that the letters signed H. B. Rogers were written and signed by the plaintiff and received by the defendant, D. A. Van Valkenburg. It was also admitted that the letters and telegram signed by D. A. Van Valkenburg & Son were written by defendant, D. A. Van Valkenburg, and the letters sent by mail, and the telegram by telegraph, and received by plaintiff.

[Counsel for plaintiff stated a the time of offering in evidence said letters and telegram to the court and jury, that he offered said letters and telegram for the purpose of

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proving a charter party or contract of hiring of the said steam tug between said Daniel A. Van Valkenburg & Son, and the plaintiff.]

To reading the same in evidence, the counsel for the defendants objected, because, if the said letters and telegram constituted a contract or charter party, it was void, not being stamped with an internal revenue stamp as required by the laws of the United States.

The Court overruled the objection and admitted the evidence.

It afterwards appeared in evidence, on the part of plaintiff that plaintiff took possession of said steam tug Union, immediately after the receipt of the telegram above set forth, which was on the day of its date, fitted her up in running order, and expended about five hundred dollars in making repairs and fitting her up, and that he continued in such possession up to the 3d or 4th of September, 1866, and used and operated the same; that on the said 3d or 4th day of September, 1866, said defendants took possession of said steam tug Union, and used and operated the same during the remainder of the season of navigation for said year 1866, which closed in the fore part of the month of December in that year. It also appeared in evidence, on the part of the plaintiff that the said defendant, Daniel A. Van Valkenburg, was owner of said tug.

After the counsel for plaintiff had rested their case, the counsel for defendants produced and read in evidence two letters, which were admitted by plaintiff's counsel to have been written by the plaintiff, and by him sent to the defendant, Van Valkenburg, the material portions of which said letters are as follows:

"BAY CITY, April 13, 1866.

Messrs. D. A. VAN VALKENBURG & SON:

GENTS—I have fitted up the tug Union in A 1 order, and had I been doing it for myself exclusively, I don't know where I would have made anything better; have had her thoroughly painted, and carpenter work all that she needed, which was no small item, besides

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having her machinery thoroughly overhauled, and much of it made new; in short, have fitted her up for the whole season, everything as it should be, and since we have fitted her up, quite a number of blowers have made the remark that I would not have the tug very long, for they say that they intend to purchase her. Now, I want you to come here before you give any one an answer, and I want a chance to see what the tug can do for a season. These same men have said that the tug could not be made to do anything here. I wish you could have seen the way that the tug was laid up last fall.

They did not do anything with the machinery, but left it standing just as they had last used it, and there was not a blanket or quilt on board, nor compass, nor tool, and I cannot find them: nothing but the mattresses are on the boat.

I want a chance to buy the tug, and will bind myself to do your towing this season, and two or three seasons, at as fair or low rates as the lowest offered by any other parties, I care not who—and that, too, whenever you want it done, and would be more likely to do it by having two boats, and one of light draft, than any other parties here in that business.

Please let me hear from you without delay, and let me know when you will be here, for I want to see you. Whatever I do will be on the square.

Respectfully, &c. H. B. ROGERS.

EAST SAGINAW, August 14th, 1866.

D. A. VAN VALKENBURG & SON:

GENTS—I met a man last evening, who said he was going directly to Lockport to buy the tug Union, and I have heard of others who would like to purchase also. I have made the tug do something this season, and kept her in running order when there was a possible chance. A few days ago, I painted her thoroughly, so that she looks better than any other tug here. Last season no person would buy her at any price. Do not sell without giving me a chance. Consider my bid five hundred dollars more than any other. There will be chance enough to sell after close of navigation. Let me hear from you before doing anything, at least.

Respectfully, &c., H. B. ROGERS.

The counsel for defendant then called as a witness said defendant, Daniel A. Van Valkenburg, who testified that he was owner of the said steam tug, before and at the time of the writing of the said letters first above referred to, and at the time plaintiff took possession thereof, and that he continued to be such owner until a short time before the 3d day of September, when he sold an undivided half interest therein to said defendant, Luther Westover and one

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Smith, a partner with said Westover, and that all of the negotiations between said plaintiff and said defendant, Daniel A. Van Valkenburg, in relation to the chartering and hiring thereof by plaintiff, or in relation to plaintiff's taking possession thereof, was by letter and telegram, and not otherwise.

The defendants further introduced evidence tending to prove that they took possession of said tug, with the consent of the plaintiff, and that, on or about the 3d day of September, 1866, there was a full and complete settlement between the plaintiff and said Van Valkenburg, of all matters growing out of said contract in relation to said tug.

The counsel for plaintiff introduced evidence tending to prove that no such consent was given, and no such settlement took place.

And, thereupon, the counsel for said defendants requested the court to charge the jury that if said letters, dated respectively, February 26th, 1866, March 7th and March 12th, 1866, and the said telegram of March 17, 1866, constituted a contract or charter of hiring of said tug, between said plaintiff and said Van Valkenburg, or between said plaintiff and said D. A. Van Valkenburg & Son, that then it was only a chartering or hiring at will, and determinable at the pleasure of either party thereto, and that, in such case, said Van Valkenburg, or any other person by him authorized, was justified in taking possession of the said tug.

The court refused to so charge the jury, and defendants excepted.

The court charged the jury that the said letters and the said telegram taken together, constituted the contract of hiring of the said tug Union, between said plaintiff and said Daniel A. Van Valkenburg. To which said defendant excepted.

The court further charged the jury that, by the said contract consisting, as aforesaid, of the said letters and telegram, said defendant was entitled to the possession of and

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use of said tug Union until the close of the season of navigation for the year 1866.

To which defendants excepted.

The jury rendered a verdict for plaintiff for $1,548.75.

Wm. L. Webber, and *H. H. Hatch*, for plaintiff in error.

1. As to the first assignment of error: If this court shall hold that the laws of the United States, prohibiting the introduction of unstamped instruments in evidence, apply to state courts, then it seems clear that if the letters and telegram referred to, constituted a contract between the parties, the same was not admissible in evidence, without having a stamp of five cents upon each piece of paper constituting the contract.—*14 U. S. Stat. at Large, p. 142.*

2. The principal question, however, arises upon the merits of the case, as specified in the remaining assignments of error.

The letters and telegram fail entirely to constitute a subsisting binding contract between the parties.—*1 Pars. on Cont. p. 475.*

A mere proposition is not enough. Nor is this any more a contract if it be in writing, than if spoken only. It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately.—*Ibid.*

In his charge the Circuit Judge lays no stress upon the acts of the parties, but finds the entire contract in said three letters and telegram.

3. Upon the facts stated in the record, whether there was a contract between the parties, was a mixed question of law and fact, and should have been left to the jury to decide under such instructions as to the law, as the court should think proper. In determining this question, the jury should have been allowed to take into consideration all the correspondence between the parties, and all

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their acts in relation to the subject matter. And it was error on the part of the Circuit Judge to take this question from the jury, as he did by deciding that said three letters and telegram constituted a contract as matter of law; thus excluding from the jury the consideration of the letters of Rogers, dated April 13th and August 14th, and all the acts of the parties relative to the tug, from which their intentions might have been inferred.

T. C. Grier, for defendant in error.

There are substantially two errors alleged in the assignment of errors.

1. That the Circuit Court erred in allowing the several letters and the telegram relating to the hiring of the tug "Union" to be read in evidence; the counsel of the defendant having objected to the reading of them, "because if the said letters and telegram constituted a contract or charter party it was *void,* not being stamped with an internal revenue stamp as required by the laws of the United States."

To this objection we answer:

It is not a contract or charter party within the meaning of the revenue law. The plaintiff, Rogers, received merely a copy of the telegram produced by the manipulations of the operator. It was impossible for him to know whether the original filed with the operator at Lockport had been stamped. A stamp upon the copy received by him would have no effect, as the law has no provision for stamping copies. And the law which required a stamp on telegrams had been repealed, from which it is evident that it was not intended by Congress that telegrams should be stamped.

But if the telegram itself was such an acceptance as made a binding contract, the case is in no manner altered, for the telegraph comes within the *reason* of the

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rule in regard to parol acceptance, viz., the impracticability of stamping such an acceptance.

An offer in writing accepted by parol, requires no stamp, and where the contract arises from an offer in writing, and there is a parol acceptance, as by complying with the proposed terms, the entire contract is not in writing and cannot be stamped.—*3 Pars. on Cont. 295; Crocker v. Foley, 13 Allen, 376; Chaplin v. Clark, 4 Exch. 403; Moore v. Gorwood, 4 Id. 481.*

The statute requiring stamps to be affixed, refers to such contracts as are within themselves "completed by the assent of the parties thereto." None of these letters constitute a contract or chartering of themselves. They were only propositions or offers.—*Crocker v. Foley, 13 Allen 380; Toby v. Chipman, Id. 126; McGowan v. Harbeck, 53 Penn.*

But had these letters constituted a contract or charter party within the meaning of the revenue law, it was not void or inadmissible for want of a stamp. To make such an instrument "invalid" the stamp must be omitted "with intent to evade the provisions" of the act.—*Act of 1865, U. S. Statutes at large, 481.*

The burden of proof is not on the party offering the instrument to show the innocence of the omission, but to render it inadmissible or invalid, evidence must be introduced to show the fraudulent intent.—*See authorities last cited, and Hitchcock v. Sawyer, 39 Vt. 412, 416.*

2. The second objection is, that the judge erred in refusing to charge the jury that the "contract of hiring the tug Union was only a chartering at will, and determinable at the pleasure of either party."

The letters between the parties, the telegram and the conduct of Rogers, constitute a positive agreement and an acceptance.

By instructing Rogers to go on and fit up the tug, Van Valkenburg, in substance, informed him that the terms

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named were satisfactory; that he accepted them; that he wished no more formal bargain or instrument, and that he did not wish the services of Westover for any such purpose.

But even had it been intended by the parties, that a more formal instrument should be drawn between them, and had it been an express condition that such an instrument should be drawn, yet, it not having been drawn, we contend that the parties thereby waived it, and the letters and telegram were the evidence of the contract between them.— *Pearce v. Norton, 1 Fairfield, (Maine,) 252; 3 U. S. Circuit (N. J.) 1808; Blight v. Ashley, 1 Pet. C. Court, 15; 1 Abbott's Nat. Dig. 539; 1 Parsons Maritime Law, 231, 232.*

And this doctrine is carried to the extent, that where an agreement is made by parol, with an express understanding that it shall be reduced to writing, a party cannot escape its obligations by refusing to execute the written agreement, or proceed further with it. See cases last cited.

The court will never say that a party shall not recover upon a contract, merely because the parties at the time it was written, contemplated making another agreement of the same purport. The making of the latter in such case, would be a work of supererogation wholly immaterial and superfluous as to either of them. — *Rowland v. Phalon, 1 Bosworth, (N. Y.) 60; Adams v. U. S. 1 Nott. & H. 192; Schooner Tribune, 3 Sumn. 344.*

The subsequent letters are of no importance whatever; they were written long after the contract was made, and after all its terms became binding. The letters could make no law, nor could they alter the meaning of the original contract, unless they, by their terms, authorized the defendant Van Valkenburg to take possession of the tug.

It is not claimed that they contained any such authority; but it is claimed that they go to show that there was no contract of hiring for the season. Had the contract been verbal, the letters might have been construed as an admis-

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sion that it was a hiring at will; but as the terms of the contract were entirely in writing, what the contract really was, is no longer a question of fact, but purely a question of law, and it is entirely immaterial what either of the parties may afterwards have come to believe as to the legal effect of their agreement.—*Hepburn v. Snyder, 3 Barr. 72; 7 U. S. Dig. 28; 2 Cush. 80; 8 Mich. 66.*

And a letter written subsequently to the making of a contract by letter, cannot be looked at in construing such contract.—*Lewis v. Nicholson, 12 Eng. Law and Eq. 430; 3 U. S. Dig. 17.*

GRAVES J.

Rogers, the intestate, brought trover to recover damages, on the ground of an alleged conversion, by the plaintiffs in error, of what he claimed to be his special property in a steam tug called the Union.

It appears that in the winter and spring of 1866, Rogers was residing at Bay City, in this state, and that Van Valkenburg resided at Lockport in the state of New York. That the Union being at or near Bay City, and the property of Van Valkenburg, Rogers, in February of that year, opened a correspondence with Van Valkenburg, in order to charter the Union for the season, to run in connection with another tug called the Wave. It was thought that the tug belonging to Van Valkenburg would require some fitting up before commencing business, and that the season had already so far advanced as to make considerable diligence necessary to prepare her for service.

This opinion seems to have had much influence in placing Rogers and Van Valkenburg in the position they subsequently occupied.

Finally, in answer to a letter, written by Rogers on the 12th of March, Van Valkenburg telegraphed on the 17th of the same month to Rogers that he could commence fitting up the tug.

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Upon the receipt of this telegram, Rogers took possession of the boat, prepared her for business at considerable expense, and then used her until the 3d or 4th of the following September, when the plaintiffs in error took possession and kept it till the close of navigation.

Rogers died after recovering judgment in the court below, and the cause was revived against his administratrix.

Upon the trial, Rogers, to maintain his action, contended that the correspondence, by letter and telegraph, embodied a contract giving to him the right of possession and use of the tug for the entire season.

This position was contested by the plaintiffs in error, who maintained that neither the letters and telegram relied upon by Rogers, when, standing alone, or taken in connection with the correspondence produced, constituted or proved any such contract. It having appeared that all the negotiations in relation to the transaction were by letter and telegraph, the Circuit Judge instructed the jury that the letters submitted by Rogers, being those of February 26th, March 7th and 12th, and the telegram of March 17th, taken together, constituted the contract between the parties for the hiring of the tug, and that it entitled Rogers to the possession and use of the boat until the close of the season of navigation for 1866.

This charge raises the vital question in the case. As there was no dispute as to the authenticity and due reception of the letters and telegram, and as the language employed was capable of being understood without extrinsic aid, it was the duty of the court to tell the jury what that correspondence contained, and what it meant. There was no error, therefore, in assuming to instruct the jury upon the subject. We think, however, that the instruction given was erroneous. It appears to us that while the correspondence showed that the parties had begun to make a bargain, it also showed that no bargain was perfected. The first letter of Rogers, being that of February 26th, contained a distinct proposition for

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the hire of the tug for the season, but the answer of Van Valkenburg, under date of March 7th, contained an explicit rejection of that proposition, and proposed a different arrangement.

This offer of Van Valkenburg was vague and general, and fell short of an unqualified proposition to charter the boat to Rogers for the whole season, and the latter replied to it under date of March 12th, in the following terms:

"Yours of the 7th inst. is at hand, I think favorably of your plan, and will take tug Union, with the understanding that your towing is to be done at any time that you may call for it, but would like to have some definite understanding about what I am to do, or about what I am to give. If you know about what amount of logs you have to tow, please state how much I shall pay you besides doing your towing.

It is high time that fitting and repairing had commenced. If I take her, painting and repairing should commence this week, and I would like to have you telegraph as soon as you get this, because nearly every other boat is ready to come out as soon as the ice clears from the river. I will do just as I agree, and as the season is far advanced and little time left in which to make repairs, and it seems a long time to wait for an answer by mail, I think it would be best to let me hear from you by telegraph. And whatever you want done in relation to a bargain, perhaps you could have it done through Mr. Westover, after informing him what you want."

It was in reply to this that the short telegram was transmitted, and which was evidently meant to inform Rogers that he could commence the work of repairing at once, and leave the consummation of the bargain to a more convenient occasion.

In this the telegram was responsive to the sense of the letter of Rogers which called it out. From that letter it is quite obvious that Rogers was anxious to secure the

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use of the vessel upon some terms falling within the general proposition, as he understood it, submitted by Van Valkenburg, and was desirous that she should be ready for business in the opening of navigation; that he was quite confident that if permitted to put the boat in condition for service, he would have no difficulty in completing an arrangement with Van Valkenburg, agreeably to the outlines stated in Van Valkenburg's letter of March 7th. But the closing paragraph of the letter, written by Rogers on March 12th, excludes the idea that such letter, or the telegram, in answer to it, was meant to close and perfect a bargain.

The parties were disposed to trust each other, and their correspondence shows that they meant that Rogers should commence fitting up the boat without delay, in order to have her ready for service, and that the bargain which they had corresponded about could be completed afterwards. It does not appear, however, that the bargain was ever accomplished.

The subsequent correspondence submitted in evidence by the plaintiffs in error, tends strongly to confirm the opinion already expressed, and there is no occasion, therefore, for reviewing it, or for inquiring whether it was right to disconnect it from the rest, when seeking to ascertain whether the correspondence constituted a contract or not.

As the letters and telegram did not establish a contract, the objection that no revenue stamp was affixed, of course, disappears.

According to the view of the case which has been presented, it is unnecessary to consider the other points discussed at the bar.

The judgment below should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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Ann White, Adm'x, v. Richard L. Allen.

Appeal from allowance by Commissioners: Declaration: Judgment. Where, on the trial in the Circuit Court of an appeal from the allowance of commissioners on claims against an estate, no new issue was formed, and no declaration filed, the report of the commissioners setting forth the nature of the claims, will be considered as the declaration in the case; and any judgment beyond the claims presented to the commissioners is erroneous.

Heard and Decided April 14th.

Error to Washtenaw Circuit.

This was an appeal from the allowance of commissioners on claims upon the estate of decedent.

In the Circuit Court no declaration was filed, or new issue formed.

The claim, as presented to the commissioners, as shown by their report, was for the sum of $1,400, or thereabouts, balance due on account, and the judgment in the court below, upon the verdict of the jury, was for $2,800.

A. Howell, and *C. A. Stacy,* for plaintiff in error.

Joslin & Blodgett, for defendant in error.

The Court held that where, upon such an appeal, no new issue was formed in the Circuit Court, and no declartion filed, the report of the commissioners setting forth the nature of the claim, would stand as the declaration in the case; and any judgment in the Circuit Court beyond the claim presented to the commissioners, was erroneous.

Judgment reversed.

Alonzo S. Hatch v. Enoch J. White et al.

Case made: Writ of error: Waiver. After a case was made and filed, the party making it, sued out a writ of error, and brought the cause on to be heard on the exceptions in the case made.

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RYERSON ET AL. *v.* ELDRED ET AL.

Held, That he had waived his right to a case made. There being no bill of exceptions, the judgment below was affirmed.

Heard and decided April 6th.

Case Made from Macomb Circuit.

It appeared from the record, that after the case was made and filed, the party making it, had sued out a writ of error, and he now brought the case to a hearing on the exceptions appearing in the case made.

A. C. Baldwin, for plaintiff in error.

M. E. Crofoot, for defendant in error.

The Court held, that by suing out a writ of error, the party had waived his case made; whereupon, there being no bill of exceptions, the plaintiff in error assented to an affirmance of the judgment.

Tunis Ryerson et al. v. Samuel D. Eldred et al.

Writ of assistance, when to issue from Circuit Court. When a decree was made in this Court, requiring the complainant to deliver up the possession of certain premises, and the cause was remitted to the court below for the purpose of an accounting — *Held*, that the application for a writ of possession must be made in the court below.

Heard and decided April 6th.

Appeal from Muskegon Circuit, in Chancery.

Motion for writ of assistance.

In this case, a decree was made at the January term of this court, requiring the complainant to deliver to Samuel D. Eldred the possession of certain real estate which was in controversy, and the cause was remitted to the court below, for the purpose of an accounting between the parties.

Mr. Lothrop now moved, — on papers showing that complainant refused to deliver possession of the premises, — for an order for a writ of assistance.

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RYAN v. BROWN ET AL.

The Court denied the motion; holding that the cause having been remitted to the court below, the application could only be made in that court.

Thomas Ryan v. George W. Brown et al.

Voluntary deed: Consideration. A voluntary deed, without consideration, can only be avoided by some one having equities against it.—*15 Mich. 94.*

Riparian Rights: The ownership of lands, bordering upon a stream, extends over the bed to the middle of such stream, when it is a river. Any erection which can lawfully be made in the water, within those lines, belongs to the riparian estate, and the complete control and the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large, to the navigation, and such other use if any, as appertains to the public over the water.—*8 Mich. 18; 10 Id. 125.*

United States grant to Michigan for Sault St. Marie's Canal, extent of. The grant to the State of Michigan of land—to locate a canal upon at the Sault Ste Marie, extends only to the military reserve, and does not include private property below it.

Enforcement of State Proprietary Rights. Where the State sets up proprietary rights over property, they can only be maintained upon proof of a valid grant, or legal appropriation upon an inquest in form of law.

Sault Ste Marie Canal Board: Obstructions. The Sault St. Marie Canal Board have such a control over the canal and its approaches as to be authorized to remove such obstructions to the legitimate use of the canal as are unlawful. But they have no such judicial authority as to make their finding of any conclusiveness upon the fact of illegality, and, if they interfere with private rights, they act at their peril, and are responsible for their conduct.

Riparian Rights: Public Streams: Encroachments. In waters, whose beds are public property, erections by riparian owners, are unlawful, not because they are nuisances, but because they are encroachments on the public domain. But, when the ownership is private, and the public rights are simply easements, or privileges, the owner may use it as he chooses, subject always to the condition that he does not interfere with the full public enjoyment.

Riparian Rights: Jury: Navigation. In the case of natural water courses, the extent to which private improvements are compatible with the public use, must depend upon circumstances, and must always be a question of fact. The owner's use is *prima facie* lawful.

The right of the public for purposes of navigation must be considered as appurtenant to the ordinary means of navigation, rather than to small and insignificant boats, and it is no nuisance to erect reasonable wharves and similar improvements, as these are essential to modern commerce.

State Canal: Sault St. Marie's River: Obstructions. When certain erections built upon private property for dock purposes, and not encroachments on the natural navigation of the river, were sought to be removed by the "Sault St. Marie Canal Company," as obstructing its canal navigation:

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RYAN v. BROWN ET AL.

Held, That erections in the St. Mary's River, at the head of navigation, and serviceable to navigation, did not become unlawful by the subsequent opening of the canal, and cannot be appropriated or destroyed for canal purposes until paid for by the State. Said canal is in no sense a part of the Ste. Marie's River, but an independent water way to connect the river above the falls with the stream below, and similar to a turnpike.

The State has no more right to interfere with private property, without compensation, to make or improve a canal, than it has for a road upon land.

Constitutional law: Streams within State: Internal police. Under *Art. 18, § 4* of the Const. of 1850, which declares that no navigable stream shall be either abridged or dammed, without authority from the Board of Supervisors of the proper county under provisions of law:

Held, That the provisions refer only to such streams as are wholly within the State, and which at any given point must be under the control of one or more boards of county officers. The provision relates to the internal police, and does not apply to streams which are State boundaries.

Held, also, That the word "abridged" should read "bridged," as the clause was so adopted by the Convention.

Equity Jurisdiction: Trespass: Official oppression. When a trespass is calculated to do permanent damage to the freehold, the jurisdiction of chancery will be exercised. And where it is an act of official oppression by public officers and agents, under color of office, a less grievance constitutes a ground for an interference of equity, than when the trespass is by a private person.

Heard April 16. Decided April 20.

Appeal in Chancery, from Chippewa Circuit.

The bill in this case was filed in the Circuit Court for the county of Chippewa, in Chancery, to restrain the defendants from committing a trespass on the property of complainant by removing a dock, warehouse and certain sunken cribs, intended as the support of a dock in St. Mary's river, at the village of Sault Ste Marie. An injunction issued, which, upon final hearing, was dissolved as to one portion of the property, and made perpetual as to the residue.

The defendants appealed to this Court.

Dwight May, Attorney General, for appellants.

Complainant files his bill for a perpetual injunction against the removal by defendants of a part of an old wharf and some sunken cribs, designed as an extension thereof, situate, as he alleges, on lots 76 and 77, of private land claims, at the Sault Ste Marie, according to Whelpley's survey.

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These lots, he alleges, he bought of Ebenezer Warner; the first, in January, 1863, and the second, in April of the following year, when Warner was in possession.

That there was a valuable wharf on the river front of said lots on the Ste Marie river more than twenty years before the filing of the bill, which continued and was used until replaced by the one now standing; and that, when complainant bought, there was a number of sunken cribs, filled with stones, designed as a foundation for a wharf in front of said lots, and necessary for that purpose; that the wharf now standing, was constructed about fifteen years before the filing of the bill, and the sunken cribs about five years. That there was a warehouse on said wharf; that the said wharf, warehouse and sunken cribs are not within the navigable waters of the river, and never have been, but are parts and parcels of said lots, and of complainant's property therein, and have always been peaceably occupied by the complainant, or some one through whom he claims title.

Complainant then alleges that defendants are insolvent; and that they are proceeding to destroy said wharf and cribs, thereby causing him irreparable injury: and prays answer under oath, and a perpetual injunction against their action.

It will thus be seen that complainant bases his case and his right to relief solely on the ground that the wharf and cribs are not, and never have been, within the navigable waters of the river, but are within the limits of the two lots mentioned. If he fails to substantiate this case, his bill must be dismissed, notwithstanding he may show other equities, which would have entitled him to relief had they been set forth. — *Thayer v. Lane, Walk. Ch. 200; Warner v. Whittaker, 6 Mich. 133; Bloomer v. Henderson, 8 Id. 395; Barrows v. Baughman, 9 Id. 213; Wurcherer v. Hewitt, 10 Id. 453; Peckham v. Buffam, 11 Id. 529; Perkins v. Perkins, 12 Id. 456*; *Moran v. Palmer, 13 Id. 367; See also Story Eq. Pl. §§ 241-2, 264-8; Lube Eq. Pl. 24, and note 1, 25-6.*

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The evidence, we insist, proves that the obstructions sought to be removed are within navigable waters.

1. Any stream capable of being used in the transportation of any kind of property to market, whether in boats, rafts, or single pieces, whether guided by the hand of man or floated at random on the water, is a public stream, and subject to the public easement. — *Morgan v. King, 30 Barb. 9; Rhodes v. Otis, 33 Ala. 578; 2 Mich. 519.*

There can be no question, therefore, not only that the St. Mary River was navigable, but that the whole of the *locus in quo* was covered with navigable water; since the whole of it was not only capable of the inferior species of navigation, protected by the case of *Moore v. Sanborne*, but was sufficient for most species of water craft, and some part of it, for the largest class of lake vessels.

But complainant has introduced some evidence from which he would have the court infer that he has confined his improvements to the channel bank. We have to say of this:

There is no evidence of the existence of any channel bank distinct from the shore; but, on the contrary, it appears that there is a gradual deepening of the water from the shore line out. In any navigable stream the public right is limited to the channel. —*Porter v. Allen, 8 Ind. 1; Dalrymple v. Mead, 1 Grant's cases, 197; Williams v. Wilcox, 8 A. & E. 314; Hart v. Mayor &c. of Albany, 9 Wend. 584; Lorman v. Benson, 8 Mich. 25; Rice v. Ruddiman, 10 Id. 125.*

2. Where is vested the power of control over navigable waters?

This power is unquestionable in the state.—*Commissioners, &c. v. Withers, 29 Miss. 21; Spooner v. McConnell, 1 McLean, 345; Gilman v. Philadelphia, 3 Wallace, 713, 744; Pollard's Lessees v. Hagan, 3 How. 325.*

The state having the power to control, has also the power to improve; and she may judge of the expediency

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of improving her public rivers, and execute and provide for executing such works of public improvement as she deems important.—*Same case; State Const. Art. 18, § 4; Gould v. Hudson R. R. Co. 6 N. Y. 522; Dutton v. Strong, 1 Black. 1—32; Houck on Rivers, 195, 6, 7, 8, 9, 200–1.*

In other words, the right to decide what improvements shall be made in navigable waters, is in the state, and not in the owners of the adjacent banks, or of any jury. The whole of the navigable stream being subject to the public easement, the state may at any time improve and make the whole more useful for the public service.

Private individuals can acquire rights adverse to those of the State only by legislative authority, or, within the canal limits, perhaps by permission of the board of control.

Any permanent appropriation of any part of navigable water by an individual, cannot be protected on the pretense that enough is still left for the accommodation of others.—*Hart v. Mayor &c. of Albany, 9 Wend. 584.*

The question whether navigation is impeded cannot be gone into by defendant; it is enough that he is creating an obstruction within the limits of the public highway.—*Same case, p. 596; Angell on Tide Waters, 208; Regina v. Randall, 1 Car. and M. 496.*

If any man could gain a permanent right in a public highway by simply encroaching upon it, it would certainly be very simple and easy to acquire such rights everywhere, but especially in the newer parts of the state; and the more unscrupulous and secret the proceedings of the trespasser, the greater would be the rights which he might acquire.

We have not been able to find authority sanctioning this rule; and, on the contrary, we think it clear that one thus encroaching on the public right of navigation does so at the peril of being removed at any time when the state authorities decide the removal necessary.

Private rights cannot be claimed adverse to the public,

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short of an occupation of twenty years; but it has been held that even an acquiescence for twenty years in an obstruction will not prevent its being abated as a public nuisance.—*Renwick v. Morris, 3 Hill, 623.*

3. There is no showing of irreparable injury.

It is a general rule that an injunction will not be awarded to restrain a mere trespass. There must be something special in the case, like irreparable injury, which makes the remedy at law inadequate, or equity has no jurisdiction And the facts which constitute the irreparable injury must be set forth.—*See Adams' Eq. 209, 210, and note; Willard's Eq. 381-3; 9 Wend. 577; 1 C. E. Green, N. J. Ch. 425; 2 Id. 76; 3 Id. 215, 293.*

The only ground upon which it is claimed in this case that the remedy at law is inadequate, and the injury irreparable, is the insolvency of defendants. But this is expressly denied by the answer, and no attempt is made to sustain the bill by evidence on this point.

4. If the bill is dismissed as to Brown, it must be dismissed as to the other defendants also. The claim by authority derived from Brown, and a successful defense by him, inures to their protection. — *Buchoz* v. *Lecour, 9 Mich. 234; Ross* v. *Davis' Ex. 4 J. J. Marsh. 386; Harrison's heirs v. Devennah, 2 Bibb, 349; Clason v. Morris, 10 Johns. 524.*

L. S. Trowbridge, solicitor for complainant and appellee.

1. The deeds of the complainant from his grantor are alleged to be without consideration, and in trust, but those allegations are entirely unsupported by proof, and being only on information, and not responsive to the bill cannot prevail, unsupported by proof, against the positive sworn statements of the bill.

But the defendants are in no position to question the consideration of these deeds. It does not concern them:

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they admit that the legal title passed to Ryan, and his possession, which is really the only matter in issue, is clearly established by the proof.

2. The defendants, however, set up in their answer a right to remove the structure in question, like a plea of grant or title to the premises in question, under the Act of Congress of August 26th, 1852, granting to the State of Michigan a certain strip of public land 400 feet wide, on which to build a canal.

In answer to this it is submitted that, even if this plea were sustained by the proof, it would not justify defendants in ousting the complainant of his peaceable *possession*, by a *forcible entry*. The law provides an entirely different method for trying titles.

Lots 76 and 77 are *private* property. The forty years possession of the complainant and his grantors would presume a grant. But more than this: these claims have been recognized, adjudicated and allowed as such, and as to the Government title, *appropriated* under the Act of Congress of Sept. 25th, 1850, to those entitled, and for the purposes therein provided for.

A grant may be made by a law as well as by a patent, and confirmation by a law is as fully to all intents and purposes a grant, as if it in terms contained a grant *de novo*. *Strother vs. Lucas, 12 Peters, 454; Stockton vs. Williams, 1 Doug. (Mich.) 546.*

But, again: The premises and structures in question are not embraced in the canal grant.

That was a grant of a strip of land 400 feet wide "through the public lands known as the Military Reservation at the Falls, at St. Mary's River." This is the whole extent of the land granted, on which to locate the canal. *10 U. S. Stat. at Large, 35.*

The premises in question constituted no part of the Military Reservation, and the grant did not, and could not include them. The Military Reservation was surveyed

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and laid out at the same time, and under the same Act of Congress, as private claims 76 and 77. The canal grant was a mere gift from the United States to the State, *pro tanto*, towards the construction of the canal.

If the State should desire to appropriate private rights and property situate outside of the limits of the gift, in finishing or improving the work, it is left to acquire such rights and property in a legal and constitutional way.

This point is, of itself, sufficient to put an end to the defense of title or right, under the canal grant.

3. It was urged on the trial in the Court below that, because the premises in question are outside of the limits of private claims 76 and 77, as marked on Whelpley's map, the complainant had no right to the possession of them.

The owner of the bank is entitled to every beneficial use of the soil under the river, which can be exercised with a due regard to the public easement. — *Lorman v. Benson, 8 Mich. 18; 10 Id. 125.*

It will not be denied that the premises in question are, at least in front of private claims 76 and 77, as shown by Whelpley's map, and they come clearly within the decisions above quoted.

It may be urged that, inasmuch as private claims 76 and 77, like others in the vicinity, are bounded on the water front with a designated line, therefore it was intended to reserve all outside of that line for the use of the government.

"Grants of land, bounded on rivers, or upon the margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river." *3 Kent's Com., 427; Middleton v. Pritchard, 3 Scam., 510; Ex-parte Jennings, 6 Cow., 518; State v. Gilmanton, 9 N. H., 461; Starr v. Child, 20 Wend., Id., 149;*

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Canal Com'rs. v. the People, 5 Wend., Id., 423; Canal Com'rs. v. Kempshall, 26 Wend., Id., 404; Gavit v. Chambers, 3 Ohio, 495; King v. King, 7 Mass., 496.

The right of the riparian owner to the stream is as sacred as other private property, and the State cannot appropriate the water to public uses by artificial erections or improvements, without making compensation. *The People v. Canal Appraisers, 13 Wendell, 355.*

According to all these authorities, the main question in any case is, who owns the shore? and whoever owns the shore, by whatever mode of expression or description, takes to the middle of the stream, unless there be decided language showing a clear intention to stop short at the water's edge.

4. The first ground of defense rests upon the theory that the structures in question are an impediment to the public right of navigation in St. Mary's River.

Under the decisions in *Lorman v. Benson*, and *Rice v. Ruddiman*, before referred to, the complainant and his grantors had a right to erect and maintain the structures in question, and the defendants had no right to remove them, unless they were impediments to the public right of navigation in said river.

This species of public right does not pertain to artificial highways, such as canals and the like. It pertains only to natural highways; that is, those created by nature, such as navigable rivers and the like.

The right is founded solely on the public good and interests, and it is therefore limited. Though absolute for public purposes, yet it extends no further than the public good requires. A stream cannot be considered a navigable stream unless the public good requires its use and servitude for some purpose; it may be for floating vessels, or it may be for floating logs, but it must be for some purpose common to the public.

It was urged in the court below, by the Attorney Gen-

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eral, that the question whether any particular structure is an obstruction to navigation, is never a question of fact for a jury, but always a question of law for the court. This doctrine leads to such manifest absurdities that it would seem unnecessary to combat it at any length.

It is respectfully urged that such a question is always a question of fact under the law; a question of fact, too, depending upon various circumstances, such as the breadth of the stream, the depth of water, and especially the sort or kind of use for which the public good requires it.

The true test, then, of this public right of navigation in any particular case, will be, not the depth of water alone, nor the breadth of the stream alone, but both of these in connection with the use and purpose for which the stream is required by the public good.

5. The second ground of defense is, that the structures in question are an impediment to the navigation of the St. Mary's Falls Ship Canal.

In regard to this it is observed,

First. That such navigation has been created since the wharf was built, and it is now sought to be enlarged since the row of cribs (part of the Warner addition) was built.

Second. The public right of navigation pertaining to natural navigable rivers, which has been noticed, has no existence in artificial streams or channels. — *Moore v. Sanborn, 2 Mich. 524.*

CAMPBELL J.

Complainant being owner of certain dock property in the St. Mary's River at the foot of the Rapids, and just below the Canal entrance, had certain cribs, placed there by his grantor, intended as a foundation for additional docks on a line with the outer end of the old dock, which last, after the canal was built, had presented an angle to the line of direction of the canal. The new docks, as projected, were

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intended to remove this angular projection, by building a dock in a line substantially coinciding in direction with the side of the canal as extended. The old dock, being at the head of river navigation, had its front at a considerable angle with the general direction of the stream, as the river widened out below the rapids, and vessels could proceed no further up stream; and such a position was favorable to turning. When the canal was opened, vessels entering it would pass the outer point of the dock, and at certain stages of the wind might have found inconvenience from being brought in contact with the angle, if of light enough draft to approach it. The new dock would have presented an even front parallel with the canal line.

The bill charged defendants with threatening and attempting to remove the cribs and the extremity of the original dock, and they justified as authorized to remove them, as obstructions to navigation; their authority being an order of the Canal Board to that effect.

The answer does not show, and the proof very clearly disproves the fact, that the original or extended dock would have been any obstruction to the natural navigation of the river. It appears quite as clearly, that the altered dock would have been more convenient for shipping after the canal was opened than the old one. And the testimony, so far as it shows any inconvenience to navigation as it stands, which is very slight, shows at the same time, that the inconvenience would not have arisen except for the action of the defendants, in dredging and removing the structures upon the premises concerning which the controversy arises. We think, if the questions in the case depended on the existence of a nuisance in fact to the improved navigation, that the facts show rather that a widening out of the canal entrance over these premises would be a desirable improvement, than that these docks, as left to be maintained under the decree of the court below, would amount to such nuisance. The Circuit Court dissolved the injunction as to the lower end

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of the proposed addition, which would have presented an angle at the east end (and concerning which there might have been more controversy, if the rights of the parties depend on the riparian theory asserted by the defense), and only maintained it as to the rest.

The answer set up, but without any proof on the subject, that Ryan, the complainant, received his title from the former owner, Warner, without consideration, and upon a trust for his benefit. But defendants are in no wise concerned with such an inquiry, and a voluntary deed, without consideration, can only be avoided by some one having equities against it.—*Jackson v. Cleveland, 15 Mich. 94.*

The case, therefore, stands upon the rights of the complainant as a riparian owner, and those of the state as proprietor of the canal, and also as guardian of the rights of the public. And the defense rests not only upon a general denial of the rights of riparian owners to improve their property by wharfage, but also upon an assertion of proprietorship in the state of the property embraced within a strip four hundred feet wide, which is claimed to extend down the River over the lands in dispute.

Unless very clearly confined within less limits by the terms of the grant, we have held the settled law of this state recognizes every ownership of lands upon streams as extending over their bed, to the middle of the stream, when it is a river. Any erection which can lawfully be made in the water within those lines belongs to the riparian estate. And the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large to the navigation, and such other use, if any, as appertains to the public over the water.—*Lorman v. Benson, 8 Mich. 18; Rice v. Ruddiman, 10 Id. 125.*

The complainant's title is not shown to have been restricted in any way, except as it would thus be subject to any rights of the public in the use of the stream. And so

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far as the strip of four hundred feet wide is concerned, it never approached this land. It is granted by the act of Congress providing for the canal, as a part of the lands included in the Military Reservation, through which the canal was to be built; the act giving the right of way, and granting that width of land for its location and that of the necessary appurtenances.—*10 L. of U. S. 35–36.* There is nothing in the act assuming to override any private rights, or to include in this grant any land outside of the Reserve. It had been for many years a disputed point whether the State could cross the Reserve without permission, and if it could, there might have been difficulties in the way of condemning land, not being a part of the ordinary domain, but set apart for public purposes, and supposed to be withdrawn from plenary local jurisdiction. This grant removed any doubts upon this subject, but the United States did not and could not give the state any control over private property. That is always subject to the eminent domain for public improvements, and the state authority on that subject was already paramount; but, in order to take property for public purposes, it must be paid for. And, if the state should set up any proprietary rights over the property involved in this litigation, they can only be maintained upon proof of a valid grant, or legal appropriation upon an inquest in form of law.

The controversy, therefore, is narrowed down to the single inquiry, whether the defendants are justified in removing the structures of complainant as unlawful obstructions to navigable water, and as nuisances which they are authorized under the direction of the Canal Board to abate.

That board has such a control over the canal and its approaches, as to be authorized to remove such obstructions as are unlawful. But they have not, and could not have, any such judicial authority as to make their finding of any conclusiveness whatever, upon the fact of illegality. Such action must be had at their peril, and can never

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justify themselves or others in interfering with any rights lawfully existing. They become wrong-doers as soon as they attempt to interfere with private property lawfully existing where they assail it.

The defendants claim that this property was in fact unlawfully placed in the stream, and within the jurisdiction of the board to remove. And it is asserted that every erection in the water is unlawful, as interfering with the right of navigation, which extends over the whole stream to the shore.

In those waters whose beds are public, and not private property, erections by riparian owners are unlawful, not because they are nuisances, in the proper sense of the term, but because they are encroachments on the public domain, and they are as unauthorized as would be the erection of houses or barns upon public land away from the water, by an adjoining landholder. But, where the ownership is private, and the public rights are simply easements or privileges upon it, the owner may do what he pleases, so long as it does not injuriously affect the public enjoyment. On land, where roads are laid out of a prescribed width, the law or the authorities having determined that width to be desirable, the right to encroach upon the way cannot be very extensive. But where the way exists in a watercourse, whose boundaries are variable and laid down without human intervention, the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact. The owner's use is lawful until shown to be unlawful. It is plain enough that there are streams which cannot safely be encroached upon at all, while there are others so considerable that they could not be appreciably injured by a very extensive system of dockage or other erections in their beds.

The rights of the public for purposes of navigation must be appurtenant to the ordinary means of navigation. Small

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boats can land where large ones do, but large ones cannot go where small ones can. It would be absurd to apply rules to the enjoyment of rights of navigation, as if canoes and scows, instead of ships and steamers, did the business of the country. If wharves and similar conveniences were not allowed upon our large streams, the shipping business would become practically worthless. It can never be unlawful for a land owner to make such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances, as narrows, bends, or the like, which may in particular cases render his structures improper. Then the private right must yield to the public right. But where they do not conflict, there is no wrong done.

In the case before us, the original wharf went out into the stream as far as the proposed extensions. No vessel could pass above it, as it was just below the Rapids, and was the extreme upper limit of navigation. For all practical purposes the navigable stream began there.

It is admitted that before the canal was built, the wharf was a necessity, and operated as a very great convenience to vessels. And from the end of the wharf to the old shore line, even if it had been deep water, the space was not more than an ordinary steamer's length, while, in fact, the proof shows that it approached shoal water so nearly, that at that point the water, which was deeper lower down, was too shallow to accommodate large vessels. There was nothing which could be called navigable water available above it.

This structure being lawful, and any additions which could have been made to it above, being in no way adapted to interfere with navigation, the State undertook, not to improve the navigation of the river, which practically ended there — the Sault being an insurmountable obstacle — but to make an artificial water-course in the shape of a canal, to connect the waters above the Falls with the stream below. This canal is in no sense a part of the river. It is as dis-

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tinct from it as if the waters it connects were two separate streams. The rapids severed the upper and lower waters as effectually as if they flowed in different channels. The canal is an independent water-way, like a turnpike, which can only be used upon such conditions as the State, under the Congressional grant, might lawfully impose. The premises in question are not within it, and have never been assumed under the eminent domain for public use. The erections are not charged in the answer to obstruct any but canal navigation, and the proofs show that such is the only effect, so far as they are obstructions at all.

The State has no more right to interfere with private property without compensation, to make or improve a canal, than it has for a road upon land. And if the canal entrance is desired to be made wider, and the widening is over private property, which, in the absence of the canal, could have been kept improved without any impropriety, the State may unquestionably have it condemned by some process of law provided for the purpose, or may purchase it of the proprietor; but it cannot be taken arbitrarily. It is as much the owner's freehold as if it were upland.

It was suggested on the argument that these improvements were prohibited by section 4, article 18, of the Constitution of 1850, which declares that "No navigable stream in this State shall be either abridged or dammed without authority from the Board of Supervisors of the proper county, under the provisions of law."

The constitution, as reported in its several stages, and as published, with the joint certificates of the Secretary of State, and Mr. Swegles, principal secretary of the convention, as having been enrolled and signed, uses the word "bridged" instead of "abridged," which latter is a word not commonly used in such connection.—*Convention Debates, XXXVII, 909, 828, 830, 831.*

Whichever may be the correct reading, it is, we think, plain that this provision refers only to such streams as are

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wholly within the state, and which at any given point must be under the control of one or more boards of county officers, instead of in part subject to the jurisdiction of a foreign country, with which no board of supervisors could lawfully treat or hold any official intercourse. The provision was adopted as relating solely to our internal police, where the authorities acting under state law could entirely regulate the use of the stream for the purposes proposed.

It was also claimed that the injury complained of was not such as to authorize the interference of a court of equity. But, where a trespass is calculated to do permanent damage to the freehold, the jurisdiction has always been exercised, and the circumstances of this case show that the injury must be very serious if permitted. It is not necessary to consider the insolvency of the defendants, for the remedy does not depend upon it. The case also involves an abuse of authority by public officers and agents, under color of office; and ever since the case of *Osborn v. Bank of U. S. 9 Wheat. 738*, it has been held that such official oppression would make it proper to interfere upon a less grievance than would justify proceedings on private misconduct, for reasons that are too obvious to require explanation. But, as before stated, the injury itself is, in this case, such as to give jurisdiction, independent of the position of the actors.

As complainant has not appealed, we cannot consider the propriety of the decree dissolving the injunction as to the cribs below the old dock. But the decree as made against the defendants must be affirmed, with costs.

CHRISTIANCY and GRAVES JJ. concurred.

COOLEY CH. J. did not sit, having been of counsel.

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John King v. Daniel B. Harrington.

Ejectment: Compensation to defendant for improvements: Statutory title and mesne profits: Set off. The statute authorizing a defendant in ejectment to claim compensation in certain specified cases, for the value of improvements made by him, confines the privilege to cases where the possession has been held, and the improvements made by virtue of the specific titles mentioned in the statute—*2 Comp. Laws*, §4,603. It excludes the cases where the defendant claims title in any other way.

Where, therefore, a defendant entered into possession of premises and claimed title thereto, by virtue of several tax titles, and a sheriff's deed under execution sale, and made improvements, and continued in possession during six years, it was held that he did not come within the provisions of the statute.

Held further, That though not entitled to compensation for improvements under the statute, yet he might still, by way of set off, obtain compensation to some extent for improvements if the plaintiff should proceed for the recovery of mesne profits.—*2 Comp. L.* § 4,602.

Heard April 9. Decided April 20.

Error to St. Clair Circuit.

This was an action of ejectment. The defendant having claimed compensation for improvements under the statute —*2 Comp. L.* § § *4,693 to 6*—sought to defeat plaintiff's title by proving title in himself; first, by deed made on a sale under execution; and, second, under several deeds from the Auditor General, for delinquent taxes. Judgment for possession was rendered in favor of the plaintiff, and a judgment for compensation for improvements in favor of the defendant.

Mitchell & Farrand, and *Maynard & Meddaugh*, for plaintiff in error.

In this case, the plaintiff is the owner under a patent from the United States. The defendant is in possession claiming adverse title.

The plaintiff's title is undisputed; but defendant claims that he has such a title, and has had such possession as entitles him to compensation for improvements.

The defendant holding and claiming under the sheriff's deed, as well as the tax deed, cannot claim that he has

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been in actual possessfon oi the premises for six successive years before the commencement of the suit, claiming title by virtue of a sale made by the Auditor General, for the non-payment of taxes, and therefore is not entitled to compensation for improvements under section 4603 of the compiled laws.

To entitle him to such compensation, he should have taken possession under, and relied only on, his tax title. He stands in the same position as if he had no tax title, and claimed only under sheriff's deed.

This statute is in contravention of the common law, and to entitle a party to its benefits, he must be strictly within the statute. However much equity might abate from the damages in an action for the mesne profits, no decision goes to the extent of giving improvements against, or as contingent to, a recovery of possession. Improvements might be set off or recouped in the action for waste or mesne profits, but not set up to prevent or hinder the original recovery.—*1 Kent. Com. 334; 5 Johns. 272; 1 A. K. Marshall, 444; 2 Johns. Cas. 281; 1 Johns. Ch. 387; 8 Wheat. 81 and 82.*

According to the strict rules of the common law, the owner recovers his land in ejectment, without being subjected to the condition of paying for the improvements which may have been made upon the land by an adverse possessor.—*Blackwell on Tax Titles, 587; 4 Metc. (Ky.) 323.*

G. V. N. Lothrop, and *C. F. Harrington,* for defendant in error.

The action is ejectment, and the material facts are as follows:

Plaintiff below claims under a patent issued to him May 22d, 1843.

One Atwater attached the lands in question in a suit against plaintiff below; recovered judgment November 9th, 1849, under which said lands were sold by the sheriff and

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deeded May 20th, 1851, to Minnie and Ashley, who, March 22d, 1852, conveyed to the defendant.

This attachment proceeding proved to be wholly void for want of jurisdiction.

The land was sold for taxes, for 1847, 1849 and 1850, and the Auditor General, by three deeds, dated respectively November 20th, 1850, October 27th, 1852, and November 20th, 1854, conveyed said lands to defendants below.

In the fall of 1852 said defendant entered into possession of said lands.

On March 24th, 1854, said defendant being in possession, filed his bill in chancery against said plaintiff, and another "to avoid an alleged fraud in attempting to establish an unauthorized redemption of the attachment title."

In this proceeding a decree was rendered according to the object of the bill of complaint.

In the present action of ejectment, the attachment sale and all the tax deeds were ruled to be invalid; and then the question arose as to the defendant's right to be allowed compensation under sec. 4693 of the compiled laws.

At the trial the plaintiff objected that the defendant could not give the tax deeds in evidence and claim possession under them, because, in the chancery proceeding, he had not, in any way, set up his tax titles. This involves, as I understand, the only question in the case, and the various errors all point to that.

1. The tax deeds were the competent evidence of the fact that the lands had been sold at tax sale and deeded by the Auditor General. No authority need be cited to prove this.

They were under the statute *prima facie* evidence of title. The burden of proof to show the invalidity of such deeds was thereby placed on the plaintiff.—*Rev. Stat. of 1846, § 82, p. 114; 1 Comp. L. p. 318 (906); Sibley v. Smith, 2 Mich. 486; Lacey v. Davis, 4 Id. 140.*

The defendant had a right to put in all his tax deeds; in other words, to rely on all his titles in defense, so

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held expressly in this court.—*Tweed* v. *Metcalf, 4 Mich. 587; Amberg v. Rogers, 9 Id. 332; Case v. Dean, 16 Id. 30.*

2. The chancery proceedings constituted no estoppel. A judgment or decree does not estop a person from raising, in a subsequent action, questions not litigated or decided in the first action.—*Knauth v. Bassett, 34 Barb. 31; 16 N Y. 575.*

No acts work an estoppel *in pais* unless some one has been thereby induced to act in such way that it would now be inequitable to allow the contrary to be set up. *Ackley vs. Dygert, 33 Barb., 176; Dezell vs. Odell, 3 Hill, 226; Lawrence v. Brown, 5 N. Y., 394; Chautauque Bank vs. White, 6 Id., 236; Jewett vs. Miller, 10 Id., 402; Plumb vs. Cattaraugus Mut. Ins. Co., 18 Id. 392.*

CHRISTIANCY J.

This was an action of ejectment. The plaintiff in error, who was also plaintiff below, deduced a perfect title from the United States.

The defendants, having pleaded the general issue, and filed a claim for compensation for improvements under sections 4603 to 4606 of compiled laws, undertook, on the trial, to defeat the plaintiff's title by proving title in himself: 1st, under a deed made on a sale under an execution issued on a judgment in an attachment suit against the plaintiff, the proceedings in which he introduced in evidence; 2ndly, under certain deeds from the Auditor General for delinquent taxes. He also showed that he went into possession, claiming title from both these sources (the deed on the execution sale and the tax deeds), and that, in reliance upon both, he had made large improvements on the land, and had remained in possession, relying upon all the deeds, for more than six years before the commencement of the action.

Both the deed from the sheriff and those made under the tax sale, having, on the trial, been shown by the plaintiff to be invalid; the question arose whether the defendant,

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under these circumstances, was entitled to compensation for his improvements. The Circuit Court held that he was; and this is the question for our decision.

It is insisted, on the part of the defendant, that though he claimed under, and relied upon, both species of title, he did not the less claim under each; and that, though he claimed title under the sheriff's deed, it is none the less true that he "claimed title by virtue of a sale made by the Auditor General for taxes," and that this brings him within the words and intention of the statute, as clearly as if he had claimed title on the latter ground only.

This argument at first view seems plausible, as it appears to bring the defendant within the letter of the statute; and I confess I was at first disposed to doubt whether it did not also bring him within its intention. But on reflection, I am disposed to agree with my brethren, that the legislature having given this privilege to the defendant in ejectment in certain specified cases only, have by this specification just as clearly shown their intention to exclude every other class of cases from the operation of the statute, as if they had expressly so declared; and having therefore (as applied to this case) given the right only to a defendant claiming title by virtue of a sale made for taxes, the legislature must be supposed to have intended to exclude cases where the defendant claims title in any other way, and to have intended to confine the privilege to cases where the possession has been held and the improvements made in reliance solely upon the tax sale and deed, or at least upon this and some of the other modes specified in the statute.

We therefore think the defendant was not entitled to compensation for improvements under this provision of the statute; though he might still, by way of set off, obtain compensation to some extent for improvements under section 4602, if the plaintiffs should proceed for the recovery of mesne profits. The judgment of the Circuit Court, in so far as it relates to compensation to the defendant for im-

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provements, must be reversed, with costs, and so far as it is in favor of the plaintiff for the recovery of the lands, it must be affirmed. This being ejectment, the record should be remitted to the court below, as the defendant may (if this was the first trial) be entitled to a new trial under the statute.

The other Justices concurred.

William Final v. Absalom Backus.

Setting aside of default: Discretion of Court: Common Law Record. The setting aside of a default, and the proceedings based thereon, by the Circuit Court, pertains exclusively to the practice of such court, and forms no part of a common law judgment-record. It constitutes no ground of allegation of error,

Amendments: Power of Circuit Court: Name of Party. Under the Statute—*2 Comp. L.* §4,415—allowing amendmets, the Circuit Court has power to permit the incorrect statement of the name of a party to the record, to be amended.

In this case, the plaintiff's name was erroneously stated in the writ as "Absolem Baxter," instead of "Absalom Backus."

Assignment of right of action for tort: General rule: Exceptions. As a general rule, the right of action for a tort is not the subject of assignment. But the rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him.

Rights of action for such torts as survive to the personal representatives may be assigned so as to pass an interest to the assignee, which he can enforce by suit at law.

The assignee of a demand, originating in favor of an assignor, for the conversion of logs obtained by a trespass upon certain land granted to the assignee may bring trover in his own name.—*2 Comp. L. 4159; Sess. Laws, 1865, p. 102.*

Evidence, presumption as to existence of, on the trial: Record. When no objection was made to the introduction of certain deeds, *held*, that this court would not consider the objection that it did not appear that the grantors in the deeds owned the land described therein; and the Court will not assume, in the absence of evidence in the record, that their relevancy did not appear.

Conveyance: Title of acknowledging officer: Certificate of execution. The only description of official character of the person acknowledging a deed in New York was "J. P." appended to his name.

The certificate prescribed by statute as to execution of deeds in other states was attached, and in due form, and also contained an attestation of the official character of said acknowledging officer as a Justice of the Peace. *Held* competent evidence.

Trover: Time of conversion: Value. Prior to the assignment of the right of action in this case, the logs in question were removed from Sanilac county, the

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place of cutting, to an adjoining county (Saginaw) and there manufactured into lumber.

In an action of trover for their conversion, the plaintiff offered evidence tending to show the value of the logs in Saginaw. *Held* competent.

Although the owner of the land from which they were taken might have have treated their removal as a conversion, he was not compellable to do so, but could have followed the logs and reclaimed them at Saginaw.

The plaintiff, therefore, had a right to treat the time of the manufacture of the logs into lumber, as the period of conversion.

Written evidence: Oral evidence to the same point, effect of. Where written evidence was introduced, showing the time of the purchase of certain land upon which a trespass had been committed, and oral evidence to the same point was admitted; *held*, that though unnecessary, it could not prejudice the defendant.

New Trial: Discretion of Court: Record. The granting of motions for new trials is in the discretion of the Court, and constitutes no part of the record.

Heard April 16. Decided April 20.

Error to Saginaw Circuit.

This was an action of trover to recover the value of certain logs.

The summons erroneously described the plaintiff as Absolem Baxter.

In the declaration the true name was given; to wit, Absalom Backus.

The default of plaintiff was duly entered by defendant and made absolute, on the ground that no declaration had been filed corresponding with the title of the plaintiff as described in the summons.

Subsequently, the Court granted the defendant leave to amend the writ by inserting the true name of plaintiff.

The default of plaintiff was thereupon set aside.

The cause proceeded to trial, and the jury rendered a verdict for plaintiff.

The defendant moved for a new trial for the reasons:

First: That the Court admitted irrelevant and incompetent testimony.

Second: That the verdict of the jury was against the weight of testimony.

Third: That the verdict was excessive.

The motion was overruled and judgment was entered for plaintiff.

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Upon the trial the plaintiff offered in evidence a copy of a certain deed of conveyance. The defendant objected because there was no subscribing witness, and because there was no proof of the execution of the deed, or otherwise, to entitle it to be received in evidence. The certificate of the proper officer was attached thereto, and complied with the provisions of the statutes of Michigan regarding such conveyances.

The Court overruled the objection, and the defendant excepted.

The plaintiff, further to maintain and prove the said issue, offered in evidence a copy of a certain other deed.

The plaintiff then offered a certain other deed in evidence.

The defendant objected, because there was no subscribing witness and no proof of its execution, and because its execution did not appear to have been acknowledged before any officer authorized by law to take the same: the initials "J." P. being attached to his name.

The certificate of the proper officer was attached to the deed and complied with the provisions of the laws of Michigan. It also described the officer who acknowledged the deed as being a Justice of the Peace.

The plaintiff, further to prove the issue on his part, called Wm. Pinkerton, who, being sworn, testified: that he cut pine logs for the defendant under a written contract, upon certain lands of the defendant in the county of Sanilac, adjoining the land described in the deed introduced in evidence from Stebbins and wife to the plaintiff; and also gave evidence tending to prove that he and his men cut a number of pine trees on the northwest quarter of the southwest quarter of section eight, township thirteen, north range twelve east, and that he put the defendant's mark upon the logs cut from the said land, and banked them on the Cass River in said Sanilac county, for defendant; and after that, run them, with the logs he cut from

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defendant's land for defendant, to the jam one-half mile above plank road bridge, at Cook's, above Bridgeport, and about ninety miles from where they were cut; that he began cutting on the 13th of November, 1866, and finished on the 5th or 6th of April following, and quit drawing logs then; that when put in the river some of the logs were worth $10 per thousand, and the balance $7 per thousand feet, and that he thought the trees were cut on plaintiff's land in January, 1867.

The plaintiff then called James A. Walker, who, being sworn, gave evidence tending to prove that he was one of the firm of Dolsen & Walker, and sawed between six and seven hundred thousand feet of logs for defendant, marked with his mark at their mill on the Saginaw River, in Saginaw county, in the year 1867.

The counsel for the said plaintiff then put the following question to said witness: "What was the value of the logs you sawed that year for the defendant?" but the counsel for the defendant objected to said question and the evidence thereby sought to be given, because it was irrelevant, incompetent, not pertinent to the issue; and because it would not prove the value of the specific property claimed in this suit, and because it would be proving the value of the logs in the county of Saginaw, while the conversion was alleged to have been in the county of Sanilac. The court overruled the objection, and defendant excepted.

The said witness answering said question, testified, that the logs were worth ten dollars a thousand feet, at their boom in the Saginaw river.

The counsel for the plaintiff then offered the plaintiff, Absalom Backus, Jr. as a witness, who testified, "That in the summer of the year 1867, he called on the defendant to try to induce him to settle for the timber cut on his land; he said that he had none of his timber."

The counsel for the plaintiff, then asked him "when did you purchase that land?"

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The defendant objected. The court admitted it, and defendant excepted.

Plaintiff replied, "that he made purchase of the land on the 24th or 25th of March, 1867; that he and Stebbins talked about any trespass having been committed on the land, and that his was to be the right to prosecute for any such trespass, for his own benefit; that he asked Stebbins if he, plaintiff, should go on the land and find timber had been cut, what should he do, and that Mr. Stebbins replied: If there has, you are authorized to prosecute and collect pay for the timber that has been cut off."

Plaintiff then introduced a letter from Stebbins, enclosing a written authority from him to the plaintiff to prosecute for any trespass committed upon the land.

Defendant objected to its introduction, as being irrelevant, and not stamped pursuant to law.

The plaintiff then offered to put a five cent United States Internal Revenue Stamp on said letter. The defendant's counsel objected, that said stamp was insufficient, and not of the amount required by law.

The court overruled the objections, and defendant excepted.

The defendant, William Final, testified that good common logs were worth on the bank about $6 per M feet; and ones and twos were worth from $10 to $12 per M feet. And, on cross-examination by counsel for plaintiff, said Final testified as follows: "My logs netted about $11 per M feet altogether."

The following are the assignments of error:

First. — The Circuit Court erred in entertaining the motion of the plaintiff, Absolem Baxter, to amend by inserting the name "Backus, Jr.," in place of the name "Baxter."

Second. The court erred in granting the said motion to amend the name of the plaintiff, and erred in ordering the summons and all subsequent proceedings amended, by

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striking out the word "Baxter" and inserting "Backus, Jr." in lieu thereof.

Third. The court erred in setting aside the default of the plaintiff, Absolem Baxter, and the order making said default absolute and interlocutory judgment, without any motion having been made therefor, or entered in the special motion book, pursuant to the rules of said court.

Fourth. The court erred in allowing the plaintiff, Absolem Baxter, to move to amend the plaintiff's name as aforesaid, and in entertaining said motion while said plaintiff was in default, and before said default and the order making the same absolute, and rendering interlocutory judgment thereon, had been set aside and vacated.

Fifth. The Court erred in receiving the affidavit of I. M. Smith, as the basis of the aforesaid motion to amend, and in granting said motion for matters appearing in said affidavit.

Sixth. The court erred in overruling the motion for a new trial, and in rendering judgment against the defendant William Final.

Seventh. The court erred in allowing the plaintiff, Absalom Backus, Jr., to read in evidence the deed of conveyance, a copy of which is annexed to the bill of exceptions, marked Exhibit "A."

Eighth. That the verdict of the jury was erroneous, and manifestly against the evidence in the case, and because the evidence in the case did not sustain and authorize said verdict.

Ninth. The court erred in allowing the plaintiff, Absalom Backus, Jr. to read in evidence on the trial of said cause, the deed of conveyance, a copy of which is annexed to the bill of exceptions, and marked exhibit "B."

Tenth. The court erred in deciding the following question, "What was the value of the logs you sawed that year for the defendant?" might be put to the witness, James A. Walker, and in receiving the answer thereto in evidence.

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Eleventh. The court erred in deciding that this question, "When did you purchase that land?" might be put to the witness, Absalom Backus, Jr. and his answer thereto received in evidence.

Twelfth. The court erred in admitting and allowing to be read in evidence the letter from T. P. Stebbins to Absalom Backus, Jr., dated August 1, 1867, set forth in the bill of exceptions.

Peck & Clark, for plaintiff in error.

The plaintiff below being in default, could only move to set the default aside, and the Circuit Court therefore erroneously entertained plaintiff's motion to amend, he being out of court, until the judgment of *nol pros* was vacated.—*Green's Pr. 299; Cook v. Allen, 3 Tyrw. 378; 5 Taunt. 649; Sparrow v. Naylor, 2 Bl. 876, 759; 1 Tidd's Pr. 421, 2, 58 and 60; 3 Barn. & Ald. 272; 3 Dowl. 404; 1 Hodge, 75.*

Courts will not allow amendments which change the parties to the action, unless there is something in the record to authorize the amendment. More especially is this the rule in relation to amendments that change the plaintiff.—*3 Chitty, Pr. 199; 1 Dowl. R. 519; 2 Id. 633; 1 Chitty, Pl. 14; 1 Story, 310; 8 Sergt. & Rawle, 53; 4 Cow. 148, 158; 22 Wend. 608; 11 Illinois, 587; 27 Id. 39; Peterbaughs Ill. Pr. 527; 3 Conn. 157; 1 Bac. Abr. A. Misnomer; 5 Watts, 373.*

The rules and practice require a special motion to set aside a default within four days after its entry. The motion on which the order was based was only to amend. Courts will not grant what is not prayed for.—*Circuit Court Rules, 27 and 29; 1 Burrill, Pr. 336; 10 Wend. 547; 1 Cow. 185.*

The court erred in receiving the affidavit of I. M Smith, in support of motion to amend. The carelessness of the plaintiff's attorney formed no ground for the change

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of parties, when the plaintiff could himself remedy the mistake by another suit, and the affidavit of I. M. Smith, is not entitled in the suit, and is not a part of the record, or to be noticed as such.—*Peterbaughs, Pr. 817; 3 Gilm. 366; 14 Illinois, 58; 3 Chitty, Pr. 538; 3 Tyrw. 387; 1 Burrill, Pr. 342; 4 Scam. 419; 11 Illinois, 586; 3 Dowl. 197 and 73; 2 Id. 435; 1 Mich. 115; 8 Id. 117, 126; 2 Cow. 509.*

The deeds were improperly admitted in evidence. It does not appear that the grantors in the deeds owned the lands therein described. The proof therefore did not make them competent or relevant.—*12 Mich. 431.*

The second deed having been executed after the trees were severed from the soil and made personalty, was not relevant to the point in issue, viz: the ownership of the logs by plaintiff.—*11 Mich. 535; 1 Greenl. Ev. § 51.*

The certificate of acknowledgment to said deed is insufficient, because the letters "J. P." are not an official description.—*Rood v. School Dist. No. 7, 1 Douglass, 502; 1 Burrill, Pr. 343; 2 Sergt. & Rawle, 457; 2 Phillips Ev. p. 585, N. 478; 2 Yeates, 229; 3 Caines, 128.*

The certificate to this deed did not prove that W. Baker was a Justice of the peace, because the clerk was only authorized to certify that "the person whose name was subscribed to the certificate of acknowledgment, was at that date thereof such officer as he is therein represented to be."—*2 Comp. L. p. 839, § 2729; 4 How. 522; 1 M. & S. 599; 13 Pick. 172; 6 Cow. 265; 14 Pick. 448; 1 Greenl. Ev. § 498; 2 Phillips Ev. 255; Governor v. Bell, 3 Murph. 331; 33 Maine, 297.*

Evidence of the value of logs sawed that year in Saginaw County for defendant (below) was inadmissible; not being confined to the property when converted. "In trover, the general rule of damages is the value of the property taken at the time of conversion," and "for the conversion of timber, is its value when first separated from

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the freehold."—*Sedgwick on Dam. 474, n 1; Read v. Fairbanks, 24 Eng. L. & E. 224; S. C. 13 C. B. 692; Moody v. Whitney, 38 Maine, 174.*

Oral evidence as to when plaintiff bought the land, was inadmissible under the "statute of frauds," and as contradicting the deed to plaintiff. "Where written evidence of a fact exists all parol evidence is excluded."—*1 Phillips Ev. 576 and 587, n 7; 2 Comp. L. § 3179; 1 Greenlf. Ev. § 275, 277.*

The letter from Stebbins to Backus was inadmissible because not stamped pursuant to law.—*U. S. Statutes at Large, Act July 18, 1866, p. 149; United States Int. Rev. Law of 1864, Schedule B; Emerson Guide, 163; U. S. Statutes at Large, Act March 3, 1865, p. 481.*

It was irrelevant, not being either proof of sale of the timber, or assignment of the right of action for its conversion. A tort is not assignable. "It being the sale of a suit and therefore void, as maintenance."

It did not substitute plaintiff in the place of Stebbins as the owner.—*6 Cush. 286; 23 Vermont, 531; 2 Comst. 293; 8 Wheat. 268; 12 Wend. 298.*

The court erred in denying motion for new trial, because improper evidence was admitted. The deed to plaintiff, if competent evidence, proved conclusively that the plaintiff was not the owner of the land when the trees thereon were converted into personal property.—*11 Mich. 535; 4 Barn. & Cress. 941; 1 T. R. 55; 1 Chitty, Pl. 149.*

Webber & Smith, for defendant in error.

1. The first five assignments of error cannot be considered, as the questions were addressed to the discretion of the court below, and the defendant (below) pleaded to the declaration as amended.

2. The sixth assignment, alleging error in overruling motion for a new trial, is one this court will not consider

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on a writ of error. Motions for a new trial are addressed to the discretion of the court.

3. As to the seventh assignment, there was no error.—The deed was duly certified as required by statute, and was admissible in evidence without further proof.

4. The eighth assignment cannot be considered here. The bill of exceptions does not purport to give all the evidence in the case, and error must affirmatively appear.

5. The ninth assignment stands on the same grounds as the seventh. The deed was properly certified.

The tenth assignment shows no error. It was competent for the plaintiff to prove the value of the logs at the place of conversion. The plaintiff might show the conversion at any point and might give evidence as to the value at different places, so that in case the jury should find a conversion at one or another of the places, they might have evidence of the value at that place before them. Even if erroneous, this evidence did not prejudice the defendant below, because when he was called as a witness he testifies to a higher value.

6. The eleventh and twelfth assignments relate to same point, and will be considered together.

The logs were cut from the lands in question, in the winter of 1866–7. The land was deeded to Stebbins in 1858. The deed from Stebbins to Backus is dated March 26, 1867, and was acknowledged April 3, 1867. There being no question but that Mr. Final had the logs from this land, it was only important for him to know that in case Backus should recover against him for the logs, he would not be liable thereafter to an action therefor in the name of Stebbins. The proof given by Backus and by the letter from Stebbins was only for the purpose of showing that the right of action was in Backus, and that Stebbins consented thereto. It was competent to prove that Stebbins resided in the State of New York, that at the time of the purchase by Backus, neither party knew of the actual

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condition of the land, as to whether any timber had been cut, and that it was the understanding and agreement, that in buying the land, Backus bought it as it was in the state of nature, with the timber thereon, and that it was agreed, in case it should be found that timber had been taken by trespassers, the right to prosecute should belong to the purchaser.

It was not necessary that the letter should be stamped. It was not a new contract between the parties. It was rather a recognition of a previous contract: written evidence of an existing state of facts. But before reading the letter in evidence, it was actually stamped with an agreement stamp in court. It is held in Massachusetts that the United States Revenue Stamp Law, as to the introduction of papers in evidence, only applies to the courts of the United States. *Carpenter et. al. vs. Snelling, 97 Mass. 452, 458; Lynch vs. Morse, Id. 458.*

COOLEY CH. J.

The several errors alleged in this record will be considered somewhat in the order in which the supposed objectionable proceedings took place in the progress of the cause.

The third assignment of error relates to the action of the court in setting aside the default of the plaintiff and the proceedings based thereon.

This action pertains exclusively to the practice of the court, and forms no part of a common law judgment record; it cannot therefore constitute a ground of allegation of error.—*Pearson v. Eaton,* recently decided.

The first, second, fourth and fifth assignments of error are based upon the proceedings of the court in permitting an amendment to correct the name of the plaintiff, which by the mistake of his attorney was erroneously given in the writ.

If the court had jurisdiction to permit such an amend-

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ment, its action in allowing it like that in setting aside a default, would be purely a matter of discretion, and should not be introduced into a judgment record.

The plaintiff in error has referred to several cases which he thinks establish the position that the court has no authority to permit such an amendment, unless, which was not the case here, there is something in the record to amend by.

The most of these cases however, are cases where the amendment had the effect to change the parties to the suit. Such was the case in *Wilson v. Wallace, 8 Sergt. & R. 53; Chamberlain v. Hite, 5 Watts, 373, and Willink v. Renwick, 22 Wend. 608,* in each of which it was sought to add a party by amendment, and in *Peck v. Sill, 3 Conn. 157,* where it was sought to strike out the name of a party plaintiff. Such an amendment would obviously change altogether the ground of recovery, and we do not doubt the correctness of the decisions which hold it not permissible. There are some cases, however, where the amendment to correct the name of the plaintiff has been held, in the absence of any statutory provision applicable to the case, to be inadmissible.—*Albers v. Whitney, 1 Story, 310; Lake v. Morse, 11 Ill. 587;* while on the other hand in *Elliott v. Clark, 18 N. H. 422,* the Supreme Court of New Hampshire, permitted such an amendment to be made. "We are of opinion," say the court "that the power to amend depends not upon the question, whether the amendment changes the name, but whether or not it really changes the party. If it only cures a mistake in the name of the party in fact prosecuting the writ, it may be made. But if it introduces a different party it is inadmissible."

We think, however, that this question is settled by our statute of amendments, which permits the court in which any action shall be pending to amend any process, pleading or proceeding in such action, either in form or substance, on such terms as shall be just, at any time before judgment

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rendered therein.—*Comp. L.* § *4415*, and which, in specifying the defects for which a judgment shall not be stayed, reversed, impaired or in any way affected, expressly mentions any mistake in the name of any party or person.—*Comp. L.* § *4419*.

Under the statute from which ours is taken, errors in the names of plaintiffs have been suffered to be amended in New York;—*Agent of Mount Pleasant Prison v. Rikeman, 1 Denio, 279*; and the same ruling has been had in Massachusetts;—*Kincaid v. Howe, 10 Mass. 203; Sherman v. Connecticut Bridge, 11 Id. 338.* In *Wight v. Hale, 2 Cush. 486*, the court speaking of an amendment of the name of one of the plaintiffs from *Wright* to *Wight* say, "that the court were not only authorized but required to allow the amendment, cannot admit of a doubt. By the Revised Statutes, *Ch. 100*, § *21*, it is enacted that no writ, process, declaration or other proceeding in the courts, in course of justice, shall be abated, arrested, quashed or reversed for any circumstantial error or mistake, when the person and case may be rightly understood by the court; and by the 24th section it is further enacted, that no judgment shall be reversed for any defect or imperfection in matter of form which might by law have been amended; and by the *Statute of 1839, Ch. 151*, § *1*, it is provided that amendments, not material to the merits of the case, and by which the opposite party cannot be prejudiced, may be allowed without payment of costs. It has been argued for the defendant that by the amendment a new plaintiff and a new firm were introduced, but we think it clear that such was not the effect of the amendment. The effect was properly to correct a clerical mistake, which had occurred by the misnomer of one of the plaintiffs, and it is quite clear that such a mistake may be corrected by amendment."

This decision, under a statute quite similar to ours, appears to us reasonable, and fully warrants the action of the court below in this case.

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The twelfth error goes to the right of the plaintiff to maintain the action upon a demand originating in favor of his grantor, for the conversion of logs obtained by a trespass upon the land granted to him, and which was assigned to him before the commencement of suit.

Our statute — *Comp. L.* § *4,159*, as amended in 1863, permits the assignee of any bond, note or other chose in action, to sue and recover the same in his own name; and it is not claimed that this action is improperly brought, provided the demand is properly assignable.

The position is, that the right of action for a tort is not the subject of assignment; and this, we understand to be the general rule. — *1 Spence, Eq. Juris. 180–1; 2 Id. 868 to 873; Adams' Eq. 54; Story's Eq. Juris.* § *1040, g; Carroll v. Potter, Walk. Ch. 365; Rice v. Stone, 1 Allen, 566*; *Comegys v. Vasse, 1 Peters, 213.* But this rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law. —*North v. Turner, 9 Sergt. & R. 234; Butler v. The N. Y. & E. Rail Road, 22 Barb. 110*; *People v. Hudson R. R. R. 4 Duer, 74; Waldron v. Willard, 3 E. D. Smith, 488; McKee v. Judd, 12 N. Y. 622; Rice v. Stone, 1 Allen, 566; Jordan v. Gillen, 44 N. H. 424.*

The seventh and ninth assignments of error relate to the admission in evidence of certain deeds which purported to be executed in the State of New York, and which were certified in the manner required by our statute to entitle them to record.

In their brief, counsel claim the admission to have been erroneous, on the ground that it does not appear that the grantors in the deeds owned the lands therein described, and that, consequently, they were irrelevant.

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It is a sufficient answer to this, that no objection on that ground appears to have been taken on the trial, and we cannot assume on this record that their relevancy did not appear. It is also claimed that one of them was imperfect in acknowledgment, the abridgment "J. P." appended to the name of the person taking the acknowledgment being the only designation of official character; and this, it is claimed, has no understood meaning in the law. Our statute, however, prescribes what shall be the evidence that a deed, executed out of the state, is properly acknowledged according to the laws of the state where the execution takes place; and that evidence is furnished in due form by the certificate appended to this deed. The officer who certifies to the due execution of the deed, explains the meaning of the abbreviation by attesting the official character of the person employing it.

The tenth error is based upon the admission of evidence to show the value of logs taken from the land trespassed upon, after they had been removed to Saginaw, in an adjoining county to that in which the trespass was committed.

The action was trover for the conversion of these logs, and as, upon the theory of the plaintiff's case, they were the property of his assignor, as well after they reached Saginaw as before, we perceive no error in receiving evidence of their value at that place. The actual change in the character of the property appears to have taken place when they were manufactured into lumber there; and although the owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compellable to do so, but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion, and to recover their value accordingly.

The eleventh assignment of error is upon the admission of oral evidence of the time when the plaintiff bought the land on which the trespass was committed.

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Of this it is sufficient to say that it could not possibly prejudice the defendant.

The plaintiff put his deed in evidence, as well as the written assignment of the demand sued upon; and the oral evidence appears to us to have been wholly unnecessary and entirely harmless.

Under the twelfth assignment of error, the want of a stamp upon the instrument which transferred the right of action to the plaintiff, is relied upon as rendering it invalid.

The bill of exceptions is not very clear upon this point, but the inference from the language employed is, that at the time the instrument was actually received in evidence, it had upon it a proper revenue stamp; and we do not therefore feel called upon to consider the question whether the law of Congress, excluding unstamped instruments from being received as evidence, has any application to the State courts.

The sixth and eighth assignments of error are based upon the action of the court in refusing a new trial. That action, like the order permitting an amendment of the writ, was purely matter of discretion, and constitutes no proper part of the record. It should not have been returned upon the writ of error, and, being returned improperly, we can take no notice of it.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

Myron F. LeRoy v. East Saginaw City Railway.

Corporation: Special tax: Exemption from general tax. By the laws of 1861 and 1863, under which plaintiff below was incorporated, it was required to pay an annual specific tax of 1½ per cent. on its paid-in capital, and this was to be "in lieu of all other taxes upon all the property of said Company."

Held, that the company were exempt from all other taxes.

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LEROY v. EAST SAGINAW CITY RAILWAY.

Replevin: Property seized for taxes: Public law, notice of. The Statute—*Comp. Laws* §5008—provides that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine in pursuance of any law of this State.

Held, that this provision must be construed as applying only to cases in which a valid tax might, by possibility, have been imposed and collected by regular and proper proceedings under statute authority.

Held further, that the said law regarding corporations being a general law, the collector was bound to take notice of it, and it could not avail him that the tax roll did not show that the party taxed was a corporation.

Tax Collector, how far protected by regular warrant. The fact that the tax warrant was regular, upon its face, and disclosed no illegality, cannot afford protection to the collector in this action.

It goes only to the extent of protecting him from personal responsibility as a trespasser or wrong-doer. It cannot be made the foundation of a right or claim against others, nor confer any right of property, which alone is in issue in an action of replevin.—*1 Doug. 199.*

Replevin: Detinet: Demand. Under the statutes of Michigan the action of replevin is always in the detinet, whether the taking be wrongful or not. Where, therefore, the taking was wrongful, and the plaintiff establishes his right to the property, his action cannot be defeated by a failure to make a prior demand; such failure not going to the right of action.—*10 Mich. 357, 369, 370.*

Heard April 16th. Decided April 20th.

Error to Saginaw Circuit.

This was an action of replevin, brought by the East Saginaw Railway Company against the City Tax Collector for certain property levied upon for the non-payment of taxes.

A verdict was rendered for plaintiff below.

The facts are stated in the opinion.

B. J. Brown, for plaintiff in error.

This is an action of replevin in the cepit, brought for the recovery of one pair of mares, mentioned in the declaration.

The action cannot be maintained unless the property was unlawfully taken.

The warrants annexed to the assessment rolls, it is admitted, were in due form of law; and the marshal was therein directed to collect the tax. But the Circuit Court, in effect, held the rolls to be void on their face, as against the defendant in error for the reason, to adopt

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the language of the charge, that it "was only liable to pay specific taxes to the state," and was "not liable to assessment upon the rolls offered in evidence."

Is this a correct statement of the extent of its liability? Is it exempt from special assessments for public improvements, which, if not paid, are spread over the city rolls? See charter of East Saginaw, title 6, section 44. — *Laws of 1859, '61, '65; LeFevre v. Mayor of Detroit, 2 Mich. 586; Lockwood v. St. Louis, 24 Mo. 20.*

If it be assumed that the property of the defendant in error was exempt from general taxation, this exemption did not appear on the face of the rolls. It depends upon the existence of extrinsic facts.

The warrant and rolls were regular upon their face, and trespass would not lie against the officer. — *Sheldon v. Van Buskirk, 2 N. Y. 477; Savacool v. Boughton, 5 Wend. 170; Patchin v. Ritter, 27 Barb. 34; Chegary v. Sheldon, 5 N. Y. 377; Abbot v. Yost, 2 Denio, 87; Alexander v. Hoyt, 7 Wend. 89; Bennett v. Burch, 1 Denio, 141.*

Hence replevin in the cepit cannot be maintained. — *Richardson v. Reed, 4 Gray, 441; Hopkins v. Hopkins, 10 Johns. 373; Barrett v. Warren, 3 Hill 348; Kellogg v. Churchill, 2 N. H. 412; Rextor v. Chevalier, 1 Mo. 345.*

2. The statute expressly declares that "No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute in this State." — *Comp. Laws, § 5008.*

No refinement of argument can take the case at bar out of the provisions of this section. — *People v. Albany, Common Pleas, 7 Wend. 845; O'Reilly v. Good, 42 Barb. 421; Freeman v. Howe, 24 How. U. S. 440; Gardner v. Campbell, 15 Johns. 402; Stiles v. Griffith, 3 Yeates, 82.*

Webber & Smith, for the defendant in error.

1. The defendant in error being organized as a corporation, under chapter 71 of the Compiled Laws, was

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liable to pay a specific tax to the State — *1 Comp. Laws, § 2,088* — which the statute declares "shall be in lieu of all other taxes upon all the property of said company." Therefore if there was an assessment on the general tax rolls against the said defendant in error, it was void on its face, and afforded no authority for the marshal to seize the property of the corporation.

2. But it is claimed that the statute prohibits an action of replevin for property taken under a claim for a tax. — *2 Comp. Laws, § 5008.*

To this we reply:

a. The objection comes too late. It should have been taken by plea in abatement or by motion. — *The People v. Albany, C. P. 7 Wend. 485; O'Reily v. Good, 41 Barb. 541.*

By pleading to the merits, the defendant below consents to a trial on the merits.

b. The statute only prohibits the writ, when property is taken for a tax in pursuance of a statute of this state. The property in question was not taken for a tax in pursuance of any statute of this state, but for one directly against the statute.

c. If we are correct in saying there was no tax against defendant in error on the rolls, then there was not even a pretense of authority for the seizure.

d. The plaintiff below, if the tax was void, might as well bring this writ to recover his property as a party whose goods are taken in execution could bring it to test the question of exemption, and this has often been done, and the court has never refused to enquire into the merits of such cases. — *Elliott v. Whitmore, 5 Mich. 532; Smalley v. Masten, 8 Mich. 529.*

The case must now be disposed of on the merits, and if the court holds that there was no authority for the seizure, the marshal cannot have judgment for the amount of the

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tax, for it was void, and he had no special property — no lien — only a bare possession without right.

Suppose a party pays his tax and then the collector should seize on pretense that it was not paid; or suppose no tax on the roll — or a case of double assessment and a seizure, clearly such cases are not a taking of property for a tax in pursuance of any statute of this state, and the writ is not prohibited — neither is it the case now under consideration.

CHRISTIANCY J.

This was an action of replevin brought by defendant in error, a corporation organized under chapter 71, compiled laws (to provide for the construction of train railways), and the Acts of 1861 and 1863 amendatory thereof, against the plaintiff in error, who was marshal and collector of taxes of the city of East Saginaw, who had levied upon and taken the property in question under warrants attached to his rolls, to satisfy state and county taxes, as well as certain city and local taxes assessed against the defendants in error.

The affidavit on behalf of the company upon which the writ of replevin issued, was that the property "had not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of said East Saginaw City Railway, liable to execution," &c.

By the act under which the defendant in error was incorporated, the corporation was required to pay annually a specific tax of one half of one per cent. on the whole amount of its capital paid in, which was to be paid to the State Treasurer on the first Monday of July in each year. This specific tax (with which the assessor and collector of taxes had nothing to do, and no power to assess or collect)

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is by the statute declared to be "in lieu of all other taxes upon all the property of said company."

This is a public law of which all are bound to take notice. We are aware of no law, and have been referred to none, under or by virtue of which, the tax assessed upon this company (and which the defendant below was by his warrant commanded to collect), could have been imposed.

But, it is insisted by the plaintiffs in error that the action of replevin for the property thus taken by him, is forbidden by section four of chapter 152 Compiled Laws.

This section enacts that "No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of this State."

The main object of this statute would seem to have been to prevent delays in the collection of the public revenue, and to drive parties claiming property seized for the payment of taxes, &c., to some other remedy, which should not, during the litigation, prevent the prompt collection of the tax.— *People v. Albany, (Com. Pleas,) 7 Wend. 485; O'Reilly v. Good, 42 Barb. 521; Stiles v. Griffith, 3 Yeates, 82.*

To construe this provision as intended to apply only to cases in which the taxes — for which the property has been taken — have been imposed by authority of, and in full compliance with the statute authorizing any particular taxes, so as to render it a valid tax, in pursuance of such statute, would be to make the question of the maintenance of the replevin depend in all cases upon the validity of the tax to be determined upon the trial; and this would make the statute forbid only those actions of replevin which must equally have failed without the statute. On the other hand to construe the statute as applying to a case in which there is no statute authority for the assessment and collection of any tax by the officers who may have undertaken to assess or collect one; and where no possible proceeding of such

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officers could have given them authority to impose or collect any tax under any statute of the state (or to a case where the property of some other person than the party taxed, has been seized), would be to extend the statute to cases which do not come within its spirit or intent.

This provision must, therefore, be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceeding under some statute authority. In this latter class of cases this provision would prohibit the action of replevin, though the statute authority might not have been fully complied with, and the proceedings might have been so far irregular, as to defeat a sale of real estate sold for such taxes.

It is urged, however, by the plaintiff in error, that though he may have been bound to know the law, he was not bound to know the facts which did not appear on his rolls or warrants; that these did not show that the party taxed was a corporation, that it might have been a copartnership—a fact to be determined by the assessors; and they having taxed the defendant on the rolls, he was bound to suppose the assessors had determined that the company was not a corporation, but a private association or partnership, and that he, the collector, was therefore protected by his warrants, which were regular on their face, not disclosing the illegality.

But the protection afforded on this ground does not go far enough to avail the collector in this action of replevin. It goes only to the extent of protecting him from personal responsibility as a trespasser or wrong-doer. It cannot be made the foundation of a right or claim against others, nor confer any right of or to property, which alone is in issue in an action of replevin. This point was expressly decided in *Beach v. Botsford, 1 Doug. Mich. 199.*

As to the point raised by the plaintiff in error, that no demand for the property having been made before suit, this

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must be treated as an action of replevin in the *cepit* which will only lie where trespass would lie, it is sufficient to say that the action of replevin, under our statute is, in form, always in the *detinet*, whether the taking be wrongful or not; and that, where the taking was wrongful as against the plaintiff, and he establishes his right to the property, his action cannot be defeated by the failure to make a prior demand, such failure not going to the right of action. This was so held by this court in *Trudo v. Anderson, 10 Mich. 357, 369, 370.*

The judgment of the Circuit Court must be affirmed, with costs.

The other Justices concurred.

Isaac Altman v. Abraham Wheeler et al.

Trial before referee: Bill of exceptions: Special assignments of error. Where exceptions are taken on a trial before a referee, the bill of exceptions, when settled, performs the same offices for the purposes of a writ of error, as a bill settled by the Circuit Judge, when the case is heard in open Court. All the reasons requiring special assignments of error in one case apply equally to the other.

What is a special assignment of error? Exceptions were taken on a trial before the referee, and a bill of exceptions was duly settled. When the referee had filed his report, exceptions were also taken to that, and upon these and the bill of exceptions a motion was made to set aside the report. The Court denied the motion, and the report was confirmed. The party then brought error, and assigned for error that "the Court overruled the motion to set aside the report of the referee, and confirmed the same."

Held, that this was not a special assignment of error, within the meaning of of rule 12, and therefore could not be considered.

Heard April 13th. Decided April 20th.

Error to Lenawee Circuit.

This was an action of trover for an alleged conversion of certain furs.

The case was referred by consent. The referee reported against the plaintiff below. Certain exceptions were taken to

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the report of the referee and the action of the court, all of which, with the errors assigned, are stated in the opinion.

A. L. Millard, for plaintiff in error.

Andrew Howell, and *C. A. Stacy*, for defendant in error.

1. There is in fact no special assignment of errors in this case as required by the rule.—*Supreme Court Rules, No. 12; 7 Mich. 374.*

The general assignment, that judgment should have been given for the plaintiff in error instead of for defendant in error, is invalid, and will authorize no action by the court.—*9 Mich. 250; 3 Mich. 77, 83; 7 Ind. 580; 1 Kernan, 416.*

2. The first assignment of error is just as general as the second. The principle of the above decisions, it seems to us must hold that this is just as general, and no more a special assignment of error than the other.

COOLEY CH. J.

This was an action of trover, which, in the court below, was sent to a referee, before whom the parties appeared and put in their evidence, the plaintiff taking several exceptions to the admission of evidence which were embodied in a bill of exceptions settled in due form.

The referee made his report to the Circuit Court, setting forth at length his conclusions of fact, and his deductions of law that the plaintiff on such facts was not entitled to judgment.

The plaintiff filed exceptions to this report, and upon these exceptions and the bill of exceptions, moved the Court to set aside the report. The Court denied the motion, and rendered final judgment in favor of the defendant. The plaintiff thereupon brings error and assigns for error, *first*, that the Circuit Court overruled the motion of the counsel for the plaintiff to set aside the report of the ref-

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eree and confirmed such report, and *second*, that the judgment was given for the defendants against the plaintiff, when, by the law of the land, it ought to have been given for the plaintiff against the defendants.

Rule twelve of this court requires all assignments of error to be special, and it is not claimed by the plaintiff that the second assignment of errors complies with this rule, or can be of any avail to him in this case. The first assignment he claims is sufficient, because it is based upon the only order of the court below of which he complains.

The rule requiring special assignments of error has for its object the apprising the opposite party of the grounds of complaint in the proceedings of the court below, that he may prepare to meet them in argument, or to obviate them if they relate to errors or imperfections which can be cured before argument by amendment or otherwise.

This purpose is not accomplished by any assignment so general in form as to cover the whole record, and relate to numerous objections which may appear to have been taken in the course of the proceedings, without pointing out any one or more of them on which the party will rely. Such an assignment is calculated to leave the opposite party wholly in the dark as to the point he will have to meet, and he may find on the argument that his conjectures on the subject have been entirely at fault.

The Court, too, will be compelled to wade through the record in search of objections which may be supposed to be obscurely indicated in some portion of it, but to which their attention is not distinctly called by the allegations of error. And there is always more or less danger of mistaking the real points in the case; while the record will never, with sufficient certainty, indicate them, if it should afterwards become important to inquire what they were.

In the present case, it was competent for the party to assign error upon any one of the exceptions taken before the referee; and if he had relied on any one of them, it

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was as much his duty to do so as if the bill of exceptions had been one settled by the Circuit Judge in a trial before him.

The bill of exceptions, under the statute, performs the same offices for the purposes of a writ of error as a bill settled by the Circuit Judge, when the case is heard in open court. And all the reasons which require a special assignment of error in the one case, are applicable with the same force in the other. The plaintiff might also have assigned error upon the overruling of each of his exceptions to the conclusions of the referee, provided they were aimed at such conclusions as were the subject of exception.

He has chosen, however, to assign only a general error to the action of the court in overruling his motion to set aside the report: a motion which covered the whole case. So that the first assignment of error has no greater definiteness in pointing out the error to be considered than has the second which is conceded to be too general. The defendant could not know whether the plaintiff would rely in this court upon some ruling of the referee upon a question put to a witness while on the stand before him, or upon some exception to the report of the referee, which the court concluded was not well taken.

The assignment of errors is so framed as to blend together the whole action of the referee and the Circuit Judge, and was evidently designed to give to the plaintiff the benefit of any fault that could be discovered in any portion of the proceedings; and it would be difficult to imagine a case more distinctly within the mischief designed to be remedied by our twelfth rule.

We are therefore of opinion that we cannot consider the errors insisted upon in the argument, and that the judgment must be affirmed, with costs.

CHRISTIANCY and GRAVES JJ. concurred.

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CAMPBELL J.

I should not dissent from the opinion of the majority of the court on a question of practice, if it did not involve the denial of any right of hearing to a party who has, as I think, in no respect deviated from any of our rules.

The errors which our rules require to be assigned are the errors supposed to have been committed by the Circuit Court. Where a case has been tried in that court, and the judge has made or refused rulings, each refusal or ruling complained of must be excepted to separately, and, if wrong, each is in fact a distinct error independent of the rest. In assigning errors of this sort, they may be assigned one by one, or, as held in *Niles v. Rhodes, 7 Mich. 374*, they may be included in a single assignment, which, in that case, was that the judge "gave the several instructions to the jury asked for by the defendant, and refused to give the several instructions, or any or either of them asked for by the plaintiffs." It would be difficult to make an assignment more sweeping, and yet it was rightly regarded by the court as a full compliance with the rule.

There is another class of cases wherein the Circuit Court, instead of trying the cause, simply reviews proceedings had before some other officer or tribunal, and determines upon the correctness of his rulings and findings. Thus a *certiorari* lies to a justice, and the errors complained of in his action are set forth in the affidavit. If the Circuit Court entirely affirms or entirely reverses his action, instead of assigning separate errors upon the points raised before the justice, the assignment is single, and complains of the single ruling of the Circuit Court in affirming or reversing the judgment. In *Berry v. Lowe, 10 Mich. 9*, where the affirmance was only partial, the error assigned was "that the Circuit Court erred in holding that the justice's judgment was erroneous in the several causes of error assigned in the

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affidavit for *certiorari*," and this was held to be the correct form. As the Circuit Court there reversed the judgment below as to a part, and affirmed it as to a part, this was not technically true, for the court did not hold the judgment erroneous for all the causes in the affidavit, but allowed one of those causes to prevail. But this court held the assignment good, and declared that the correct practice here was to argue the case upon all the points raised by the affidavit, whether allowed or disallowed below, although only one party had complained, and although the judgment had been partially in his favor.

In these cases, as in such as we now have presented to us, the Circuit Court makes but a single ruling, and that comes up as an entirety. Its finding cannot be severed or divided up into its elements. The error consists in that one conclusion, and the assignment which complains of that is as accurate and as specific as an error assigned on any other single ruling. The principles of law involved in the rejection of a piece of testimony, or in ruling that there is no evidence to warrant a recovery, may be numerous and complex, but the exception is made and the error is assigned on the single ruling, and not on the varied legal propositions. The power of the Circuit Court in regard to the reports of referees is identical with its power on *certiorari*, except that it may order a new trial of a referred case. But in both classes of cases it can confirm or reverse the conclusion of the inferior officer, in whole or in part, and in regard to either its judgment is alike single. If complained of in this court, it is because the objections to the proceedings were allowed or disallowed, and in both classes of proceedings, those objections are set forth in the record for the information of the Circuit Court, and come up before us on the same papers and require no further recital. We cannot do anything more or less than decide whether, on those papers, the Circuit Court decided correctly. We must go over precisely the same ground which

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that court had to traverse, whatever may be the form of the assignment, and the sole question we are to answer is, not whether this or that objection was well founded, but whether the judgment of the Circuit Court was correct upon the record presented there. If any court could review our judgment in this case, there could be no new question raised, and our written opinions would form no part of the record. They might affirm our conclusions, and yet disaffirm our reasons, and so might we do with proceedings from the circuit. The correctness of the conclusion is the only material question, and I think the only error that can be assigned, must be upon that one act of the court below. We have no knowledge of anything else which the judge may have done or said, and no means of obtaining any, as no exceptions ever lie where the decision is to be rendered on a written case, sent up for review or approval from a referee.

It seems to me, that any further assignment, instead of being more accurate, would be a direct departure from the record.

If this were a case permitting a more full assignment, I think it an unnecessarily technical practice to put a party out of court, when there neither is, nor reasonably can be, any misapprehension. The only result will be, I fear, to encourage a refinement of practice which, in a court of last resort, is not to be desired. Where the assignment points out enough to indicate the real controversy, the cases already cited dispense with repetitions which are really useless. This is the true reason why errors are not assigned on *certiorari*.

It would not be proper to discuss the main questions in this case, since the majority of the court consider them not open to examination upon the assignment. I therefore express no opinion upon them.

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The People ex rel. Barrett v. Nathaniel Bacon, Circuit Judge.

Judgment: Notice of trial: Motion to set aside. While a judgment rendered on issue joined without notice of trial or appearance at the trial so far imports regularity as not to be, *ipso facto*, void, still it is irregular and liable to be set aside on motion.

When a party against whom such a judgment has been rendered in his absence, without proof of notice of trial appearing on the files, moves at the first opportunity to vacate it, he is entitled to that relief unless it is then made to appear that notice was in fact given.

Notice of trial in appeal case: Absentees: Proof of notice under Rule 10. Under Circuit Court rule 10, providing for notices of trial in appeal cases, when a party is absent, to make such notice valid, it must appear by legal proof, that the residence of the party to whom such notice is directed could not be ascertained after diligent inquiry; and that the notice was posted up in the Clerk's office for the required period in some conspicuous place, and proof must appear of the place of such posting.

Every clause and condition of the rule is to be regarded as having some significance; and no presumption can be made to aid a statement which omits any essential particular.

Mandamus: Irregular judgment. A mandamus is the proper remedy to compel the circuit judge to set aside such a judgment as this, where he has denied a proper application.

Mandamus: Appellate Jurisdiction. Where a mandamus issues to direct the action of a legal tribunal proceeding in the course of justice, it is an exercise of supervisory judicial control, and is in the nature of appellate action. In other cases, it is generally, if not always, an exercise of original jurisdiction.

The writ, therefore, in this case should be regarded as directed to the judge officially, and as binding the incumbent, whoever he may be, and not merely the judge who denied the application and has since ceased to hold the office.

Mandamus: Costs. When the writ relates to proceedings in a cause, the party sustaining the action complained of, and resisting the granting of the writ, is to all intents and purposes represented by the judge, on the motion; he is therefore responsible for the costs.

There is no authority to impose terms when the relator is only obtaining his legal rights: The writ must be unconditional.

Heard and Decided April 21st.

Mandamus to Circuit Judge of Branch County.

This was an application to compel the Circuit Judge to set aside a judgment rendered against Wallace W. Barrett, because of an illegal notice of trial.

The facts are stated in the opinion.

Shipman & Loveridge, for plaintiff in error.

1. It is error to try a cause without it is first duly noticed

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for trial.—*2 Comp. L. § 4,347; Chamberlain v. O'Keef, 2 Mich. 357; Small v. Adrick, 5 Wend. 137; Knapp v. Mead, 2 Johns. Cas. 111; Jenks v. Payne, 15 Johns. 399; Turrill v. Walker, 4 Mich. 177; Bowen v. Clarke, 2 Wend. 249.*

The statute is imperative and makes the notice a condition precedent to the trial, and it must affirmatively appear that this condition has been performed, before a trial can be had.—*Strong v. Childs, 2 Mich. 107; Green's Prc. Sec. 901; Smith v. Roberts, 1 How. Pr. 40; 1 G. & W. New Trials, 11–18; 2 Id. 136–142; 3 Id. 887; Joslin v. Coffin, 5 How. Miss. 539; Schilling v. Welman, 5 N. S. Leg. Obs. 20; Beekman v. Reed, 5 Cow. 23; Montgomery v. Henry, 10 Mich. 19; Douseman v. O'Malley, 1 Doug. 450; Fitch v. Kettle, 3 M. & G. 856; Moredon v. Wyer, 6 M. & G. 278.*

And it seems this cannot be supplied by subsequent proof.—*Doolittle v. Ward, 5 Johns. 359.*

It does not come within the statute of amendments.

2. C. C. Rule 10 is based upon § *3854 of Comp. L.*, and that section speaks only of the notice mentioned in the preceding section. But the preceding Sec. 3,853 applies only to the first notice of trial after the appeal is taken. All subsequent notices come under the general statute, Sec. 4347; so there was no authority for serving the notice of trial by posting in the clerk's office for the term when this cause was tried, as it was not the first term after the appeal was taken, but a subsequent one.—*McDermott v. Board of Police, 5 Ab. Prc. 422; Ruthbun v. Acker, 18 Barb. 393; 2 Comp. L. § 3399 & 3399.*

3. But, reading the rules from 5 to 10 together, and giving full force to all, the order of service is: first, personally; second, by mail; and third, by posting in the clerk's office. Service cannot be made by mail so long as the parties reside in the same place, nor by posting when information of residence can be had. The rules were made to carry out the object of the statute, viz: to give the

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opposite party an actual notice of trial, not to provide a method of getting to trial without such notice being given, and thereby defeat the statute. The means most certain to get this notice to the party, are to be resorted to first. Such notice is far more likely to reach the absent party where the notice of trial is sent by mail to his residence — "to be ascertained according to the best information and belief of the person making such service" (*Rule 9*) — than when posted in a distant clerk's office; hence, service by posting is not allowed when such information can be had. A strict compliance with this order of service is demanded by every consideration of justice. The law abhors an *ex parte* trial and a construction, the least likely to result in such iniquity, should be insisted upon, and no departure from it allowed.

Looking only at Mr. Turner's affidavit, we find, that he had "satisfactory" information of where Gen. Barrett was. That is much better information than rule 9 required him to have. Also that he knew where his family resided, for he says the General was not able to be with them "but now and then." (That is immaterial, for he resided where his family lived.) Not receiving replies to his two or three letters is nothing, for *non constat* that answers were required; but not being returned to the writer was good evidence of their receipt by Gen. Barrett. The General's whereabouts was a matter of common notoriety and public information, for it was in "the papers," Mr. Turner says. Also, it appears that he knew he could get the information he did not seem to want, of Mr. Webb, and knew where the "best information" was to be had; but from all these sources, he negligently, if not wilfully, turned aside. Service by mail upon a fraction of the information confessed by Mr. Turner, (to say nothing of that which he avoided, or might have obtained by using the slightest diligence) would have been good, and hence he could not serve by posting. — *Collins v. Campfield, 9 How. Pr. 519; Jones v. Derby, 1 Ab. Pr. 458;*

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Peck v. Cook, 41 Barb. 549; Wortman v. Wortman, 17 Ab. Pr. 66; Irving s. &c. v. Hardman, 17 Ab. Pr. 67 n.

Nor does Mr. Turner anywhere state that he did not know where Gen. Barrett resided, or that he could not ascertain his place of residence.

4. Mr. Turner's affidavit only shows the notice was posted in the clerk's office. It does not show that it was posted in a "conspicuous place" therein, as rule 10 requires. This is fatal.

The motion to vacate the judgment, being stated in the case made, is subject to review in this court.—*Sallee v. Ireland, 9 Mich. 154.*

John W. Turner, for defendant in error.

CAMPBELL J.

John W. Turner having recovered a judgment before a justice against the relator, for $58.50 damages and $2.50 costs, the latter appealed it to the Circuit Court. In that court, after the lapse of several terms, Turner, without introducing any proof that he had noticed the cause for hearing, proceeded *ex parte*, and obtained a judgment for $160 damages, with the costs. When Barrett, who was out of the state on military duty, heard of the fact, he applied to the court to set aside the judgment as irregular, for want of notice. Turner resisted the motion upon an affidavit, under which he attempted to show that he had given notice by posting it up in the clerk's office, on the claim that he could not learn the appellant's residence, and that the latter had not appeared by attorney. The court, upon this showing, refused to set aside the judgment, and the case was removed on exceptions and writ of error into this court. We dismissed the writ at the last term, as not applicable to such a case, and gave permission to the relator to apply for a *mandamus* upon the same showing.

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Cause is now shown against the writ, by claiming that upon the showing made by Turner, the Circuit Judge rightly refused to open the judgment.

The statute, (*2 C. L.* § *4347*) requires all issues of fact to be noticed for trial. Rule 10 of the Circuit Court rules provides that "in cases of appeal, where the party upon whom notice is sought to be served has not appeared by attorney or agent, and his place of residence cannot be ascertained, notice may be served by posting it in some conspicuous place in the office of the County Clerk."

While a judgment rendered without notice or appearance so far imports regularity as not to be *ipso facto* void, yet the statute would be a dead letter if such judgments were not held to be irregular and against right. Where any one attempts to bring on a cause *ex parte*, the court fails in its duty, and does a legal wrong to the absent party, unless it requires strict proof of regular notice, as a condition of going to a hearing. Proceedings without notice are contrary to the entire spirit of the law, and should not be countenanced.

When a party, against whom such a judgment has been rendered, in his absence, without proof of notice appearing on the files, moves at the first opportunity to vacate it, he is legally entitled to that relief unless it is then made to appear that legal notice was in fact given.

In the present case, an attempt was made to prove such notice. In order to make it valid, the party was bound to show that Barrett's residence could not be ascertained, and that notice was posted up in the clerk's office for the required period, in some conspicuous place.

Without examining the relator's own showing, and looking only at Turner's affidavit used before the Circuit Judge, it is manifest that no positive allegation is made from which it can be assumed that Barrett's residence could not have been ascertained. Instead of making the simple and natural statement that he had made diligent endeavors, and yet

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had failed to ascertain the residence, the affiant undertook to give a narrative from which he desired that conclusion to be drawn, but which we think does not tend to establish it. It appears inferentially from the affidavit that Turner was not ignorant of the residence of Barrett's family, and also that Barrett was in the military service of the United States, and subject to removal from place to place under orders. As a man's residence is presumptively with his family, in the absence of any contrary showing, and as a military location does not, of itself, usually confer residence, that presumption should have been overcome. The affidavit in no place denies a knowledge of his residence. It merely denies a knowledge of his location. If this had been enough, it might possibly have sufficed, in connection with an allegation found in the affidavit, that he had made such inquiry, and obtained such information as he could, unless he had destroyed the force of this general statement by some particular facts showing what steps he took to inform himself. He alleges that he went to Webb, Barrett's father-in-law, and carefully concealed from him his object, and simply asked in a casual way about the whereabouts of several colonels, and among them Colonel Barrett, but taking pains to conceal his motive. Questions asked in such a way, as if out of idle curiosity, cannot be expected to set one at work to tax his memory, or to make search for information which he may have within reach. It is evident that there was not any attempt to use any diligence in ascertaining where Barrett was to be found.

There is not a single allegation tending to show ignorance of Barrett's residence or difficulty in ascertaining it.

The proof of posting notice is equally defective. It is not asserted to have been in a conspicuous place. Every clause and condition of the rule is to be regarded as having some significance, and no presumption can be made to aid a statement which omits any essential particular. Every one knows that there are many places in a clerk's office

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where a notice would be anything but conspicuous, and where, if it could be done, notices not intended to excite much attention could be safely placed, with an assurance that they would remain unread. It should have been shown that this notice was put in a conspicuous place, and the place should have been mentioned. — *People v. Highway Comrs. of Nankin, 14 Mich. 528.*

The judgment should have been set aside, and a *mandamus* is the proper remedy to compel this. But two questions are presented of some importance bearing upon the nature of the writ as an original or appellate process. The first is, whether the writ is confined to the person, or whether it reaches the official position of the judge; or in other words, whether it can act upon whatever person is for the time being judge of the Circuit Court. The second refers to the liability to costs.

Where a *mandamus* issues to direct the action of a legal tribunal, proceeding in the course of justice, it is an exercise of supervisory judicial control, and is in the nature of appellate action. In other cases, it is generally, if not always, an exercise of original jurisdiction. In the case of *Marbury v. Madison, 1 Cranch, 137,* the Supreme Court of the United States, held that the Act of Congress, authorizing that court to issue writs of *mandamus* to public officers, was unconstitutional, as giving an original jurisdiction beyond that to which they were confined by the constitution. But the practice of issuing such writs to the inferior courts of the United States has been asserted and upheld in numerous cases. In *Ex parte Crane, 7 Peter's 190,* the power to issue these writs to courts was disputed, on the ground that it was an act of original jurisdiction, but the court notice the distinction in these words: "A *mandamus* to an officer is held to be the exercise of original jurisdiction; but a *mandamus* to an inferior court of the United States, is in the nature of appellate jurisdiction,"

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p. 193. This view has been acted on ever since, and the writ has issued in numerous cases.

It would seem to follow, that the writ should be regarded as directed to the judge officially, and as binding the incumbent, whoever he may be. In all cases, the jurisdiction to issue mandamus depends on official character, and binds the officer, and the reason is, if anything, stronger where the writ issues to a court of justice. And where it relates to proceedings in a cause in court, the party sustaining the action complained of, and resisting the granting of the writ is to all intents and purposes represented by the judge on the motion. We can see no reason why he should not be held responsible for the costs as belonging in fact to the cause. A *certiorari* is, under the regular common law practice, not entitled in the cause which it brings up, or between the parties litigant, but it is like the writ of *mandamus*, a writ of the people directed to the judges. *Tidd's Pr. 403, 404.* We have in some cases retained this practice, but in bringing up cases from courts of justice, the title is generally retained as a private suit, and costs are granted as between parties. But the right to grant costs cannot depend upon the accuracy or inaccuracy of the entitling, and there is no real difference between *certiorari* and *mandamus*, in regard to the persons whom the court should consider as the true litigants. We have no doubt that Turner is liable for the costs of this application if granted, as Barrett would be, if denied.

The motion for a *mandamus* must be granted with ten dollars costs. We have no authority to impose terms, when the relator is only obtaining his legal rights, and the writ must be unconditional.

The other Justices concurred.

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Joshua Conrad v. Jacob R. Freeland.

Appeal: Justice's Court: Motion to dismiss: Record: A motion to dismiss an appeal from a Justice's Court, for the reason that the sureties on the appeal bond did not justify, is not such a part of the record as is brought up by writ of error.

Heard and Decided April 21th.

Error to Wayne Circuit.

This was an appeal from a justice of the peace to the Wayne Circuit.

In that court, on filing an affidavit of the justice that the sureties in the appeal bond did not justify before him, a motion was made to dismiss the appeal, and which was denied.

A writ of error was then sued out, and the case brought to this court.

The motion to dismiss was not set out in the return to the writ of error.

Mr. Romeyn now moved for a further return to bring up the said motion.

L. T. Griffin, contra.

The court held that such a motion could not be brought up on writ of error, and if the court below erred in refusing to grant it, the proper remedy had not been sought in this case.

Motion denied.

Edward C. Richards et al. v. Eurotus Morton.

Old Court of Chancery: Foreclosure proceedings: Jurisdiction. By the law of 1847, the office of Chancellor of the old Chancery Court, was abolished; but the "Court of Chancery" was retained. By the revised statutes of 1847, all new chancery business was conferred upon the "Circuit Courts in Chancery." The Supreme Court was empowered to wind up the business pending in the

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old Court of Chancery, and the Circuit Courts had exclusive jurisdiction in all other chancery cases. The former court continued such jurisdiction until January 1, 1852.

In a foreclosure suit commenced in 1846, in the old Court of Chancery, in Wayne County, where the mortgaged premises were:

Held, that the tribunal provided for by the act of 1847, retained complete and exclusive jurisdiction over the case until after January 1, 1852.

The records in said court showed that the notice of sale, made in 1850, was made by virtue of a decree of "the Circuit Court in Chancery for the county of Washtenaw," that the recitals in the master's deed were in the same form; that the report of sale was entitled in the same way, and addressed to said court, and that all the proceedings of the master purported to relate to a case pending in that court, and not in the "Court of Chancery."

Held further, that the written evidence of said proceedings denote that they pertained to the said Circuit Court, and not to the old Court of Chancery.

Foreclosure: Confirmation of report: Evidence of title of purchaser at foreclosure sale. It appeared that an ex-parte order was made by said Circuit Court in 1852, when it had complete jurisdiction, allowing a writ of assistance, and reciting that it appeared by affidavit on file, that Rawson, who was in possession of the mortgaged premises, "had been served with a certified copy of the order confirming the master's report of the sale."

Held, that said order did not operate as a confirmation of the proceedings, and therefore the equity of redemption was not barred.

Held further, that defendant, Morton, who claimed the premises as vendee of Edmonds, who was the purchaser of them at the alleged foreclosure-sale succeeded to all the rights of said Edmonds, as owner, by virtue of said purchase, of the mortgage sought to be foreclosed; that said complainants were entitled to redeem said mortgage, and to have an account as to the amount due thereon.

Heard April 22, Decided April 27.

Appeal in chancery from Wayne Circuit.

The bill in this case is filed to foreclose two mortgages: given repectively by Amariah Rawson and William E. Warner, to George W. Gilbert.

To the foreclosure of the latter mortgage, defendant Morton offered no defence; but he claimed a right to the property covered by the Rawson mortgage superior to that of the complainants.

The mortgage under which the defendant claimed was given to Simeon A. Dunn, and was dated July 1, 1841, and was recorded July 2, 1841.

The mortgage under which the complainants claim was dated October 29, 1847. Dunn assigned his mortgage to Newton Edmunds, who, on the 14th of February, 1846, filed a bill in the old *Court of Chancery, 2d Circuit*, to foreclose it. Subpœna was issued and served, answer and

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replication filed more than a year prior to the execution of the mortgage by Rawson to Gilbert, under which the complainant claims.

The cause was commenced and carried to a decree in the old *Court of Chancery for the 2d Circuit.* By the law of 1847, abolishing the office of *Chancellor*, the old court was retained and the jurisdiction devolved upon the justices of the Supreme Court for the purpose of disposing of the business commenced in said court as theretofore constituted.

The class of cases to which this belongs remained under the jurisdiction of said Supreme Court Judge until January 1, 1852: the land being in another county, Wayne, than that where the old court was held (Washtenaw county.)

The new courts of chancery, as created by said law were designated, "*The Circuit Court for the county of ——— in Chancery.*"

The defendant contended that the property was regularly sold under the decree to Edmunds, who afterwards conveyed it to him.

On the hearing, it appeared that the proceedings in the suit which were very imperfect, showed, amongst other things, the following:

The notice of sale, was as follows: "Notice is hereby given, that, by virtue of a decretal order made by the Circuit Court for the county of Washtenaw, State of Michigan in chancery, bearing date the 27th day of December, A. D. 1849, in a certain case pending in said court."

The master's deed, recited that, "Whereas, at a session of the Circuit Court for the county of Washtenaw, State of Michigan in chancery, held on the 27th day of December, A. D. 1849, it was among other things, ordered adjudged and decreed by said court, in a certain case then depending in said court." "And whereas I, the said Levi Bishop, master in chancery, * * * in pursuance

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of said order and decree of said court, did" sell, "having first given six weeks previous notice of the time and place of such sale," "agreeably to said order," "Now therefore, * * "in order to carry into effect the said sale so made.'

The master's report on sale, was as follows: "State of Michigan, Circuit Court for the county of Washtenaw, in chancery.

Newton Edmunds, complainant vs. *Amariah Rawson*, defendant.

To said court: "In pursuance of a decretal order of said court, made in said cause," "I, the subscriber," * * "by virtue of and pursuant to said order and decree, do hereby report."

From the journal entry of the Circuit Court for the county of Washtenaw in chancery, it appears that the following order was made by judge *Johnson*, on the 29th of September, 1853.

"*Newton Edmunds v. Amariah Rawson.*

Upon reading and filing the affidavit of Amos C. Blodget, whereby it appears that the defendant Amariah Rawson, who is in possession of the lands and premises mentioned and described in the bill of complaint and deed in this cause, was served with a certified copy of the order confirming the master's report upon a sale of the premises in this cause, and that at the same time the master's deed for said premises was produced and shown to him, and that he was then required to deliver possession of the said premises which he refused to do. Upon motion of C. Joslin, solicitor for complainant, it is ordered that a writ of assistance be awarded against the said Amariah Rawson to the Sheriff of the county of Wayne, thereby commanding him to put the said purchaser in possession of the said premises described in the said deed, and him in the possession thereof from time to time maintain and defend."

On the hearing, the bill was dismissed without prejudice.

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E. W. Morgan, and *G. V. N. Lothrop*, for complainant and appellant.

H. K. Clarke, for defendant and appellee.

GRAVES J.

The original bill in this case was filed on the sixth day of January, 1855, to foreclose two mortgages executed on the 29th of October, 1847, one by Amariah Rawson, and the other by William E. Warner, to George W. Gilbert, and such bill was followed by a supplemental one, filed by the complainants on the 14th of September, 1863.

Morton answered, but all the other defendants suffered the bills to be taken as confessed, and, on the hearing, they were dismissed as to him, and the complainants appealed to this court.

The defense interposed by Morton relates exclusively to the Rawson mortgage, and the property covered by it, which property he claims to have acquired by purchase of Newton Edmunds, whom he alleges to have been the vendee of the same on foreclosure and sale, upon a mortgage given on the same premises by Rawson to one Simeon A. Dunn several years before the execution of the mortgage to Gilbert, namely July the first, 1841.

It is maintained, on the part of Morton, that the foreclosure proceedings on the Dunn mortgage were commenced on the 14th of February, 1846, in the Court of Chancery, as then constituted, that a decree of sale was made in 1849, and that the property was sold to Edmunds, pursuant thereto, on the 15th of May, 1850.

It is seen, therefore, that the position of Morton amounts to an assertion of an adverse and paramount title, derived through the foreclosure proceedings on the prior mortgage given to Dunn.

The material question in the case is whether, by the proceedings so carried on by Newton Edmunds, he obtained the legal title and barred the equity of redemption as against those, setting up the mortgage in suit.

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The decision of this question requires us to determine whether certain proceedings essential to the completion of the foreclosure, and the validity of a title depending thereupon have been shown to have taken place. Upon this point the parties are at issue, it being maintained by the complainants that several of the most essential things for the foreclosure relied on, are in no manner shown to have been done, while it is urged in behalf of Morton that it sufficiently appears that all requisite proceedings were had, and that certain discrepancies pointed out by the complainants as to the description of the tribunal in different instances in the papers and proceedings produced in evidence, are merely verbal, and such as ought not to prejudice Morton's right.

By the act which took effect February, 27, 1847 (*Sess. L. 1847, p. 33,*) the office of Chancellor was abolished, but the Court was retained, and the jurisdiction devolved upon the Justices of the Supreme Court, for the purpose of disposing of all the business commenced in the Court as theretofore constituted. This act also continued the registers of the Court in office, and authorized the Justices of the Supreme Court to fill vacancies by appointment. By the R. S. which took effect on the first of March, 1847, jurisdiction as to all new business was given to the Circuit Courts in Chancery for the several counties.

It is seen that this law of February 27th, provided a particular tribunal for the winding up of the business pending in the old court, at the time when the Circuit Courts in Chancery for the several counties were clothed with exclusive jurisdiction in all other cases, and, on examination, it will be found that such particular tribunal continued to have exclusive jurisdiction of the matters so confided to it, until June 2, 1850, at which time by the act of that year (*L. 1850, p. 416, 417,*) certain cases were made transferable in the way, and upon the grounds specified in the act, to the Circuit Court in Chancery for the county.

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It is, however, conceded that this act did not apply to the case. As the bill to foreclose the Dunn mortgage was filed in 1846, in the old court, and the mortgaged premises were in Wayne county, the tribunal provided for by the act of February, 1847, must have retained complete and exclusive jurisdiction over the case until after January 1, 1852, when the act of June, 1851, became operative, (*Sess. L. 1851, pp. 276, 277.*)

The Courts of Chancery in this State have always been required to keep an accurate record of their decrees, orders, and proceedings, in such form as to identify the tribunal exercising jurisdiction in the given case, together with the acts performed; and the necessity for so doing is founded upon reasons so obvious and conclusive as to supercede any critical reference thereto. From the nature of the case, a particular court can, in general, be precisely distinguished upon the face of its proceedings in no other way than by the style which belongs to it, or, in other words, the appellation which the law has bestowed upon it, for the very purpose of distinguishing it from all other judicial organizations. It is undoubtedly true that in many instances a mere clerical misnomer will be amended, or rendered harmless by construction, but when this is done, it must be because the evidence of mistake comes in such shape, and under such circumstances as to leave no question as to the intrinsic rectitude of the act, the fact of mistake, and the authority to read the record or proceeding according to the truth. When, however, the written entries or files in the nature of a record, or constituting a record, furnish the only written evidence of the character of the proceeding, or of the identity of the tribunal, they must, when compatible with the general jurisdiction and course of such court, be necessarily conclusive in a collateral inquiry as to those points, in conformity with the principle which accords verity to the record, and will not permit one to be contradicted by parol.

We have seen that, from a short time after the filing of

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the bill in the old court to foreclose the Dunn mortgage, there existed and were held in Washtenaw county, until 1852, two entirely distinct and independent tribunals for the transaction of Chancery business, one having exclusive jurisdiction over that case, and the other having no concern with it whatever. It is also well known that the style or title of the court so having jurisdiction of that cause was "The Court of Chancery of the State of Michigan, for the Second Circuit," and that the style or title of the other court, which had no jurisdiction in that case, was "The Circuit Court for the County of Washtenaw in Chancery."

The first material objection to the validity of the proceedings for the foreclosure of the Dunn mortgage relates to the decree, the complainants denying that any decree of foreclosure and sale was made by the court having cognizance of the case and jurisdiction. And, although there is some ground for contending that no decree was actually made and enrolled in such court, it is not necessary to discuss that point, because we feel compelled to hold that difficulties subsequent to the supposed decree must inevitably defeat the claim of the defendant, Morton. On turning to the proofs in the case, we observe that the master's notice of the sale under which Morton makes his claim, stated that the sale would be made by virtue of a decree of "the Circuit Court for the County of Washtenaw, in Chancery," in a case pending in said court; that the recitals in the master's deed were in the same form, that the report of sale by the master was entitled in that way, and addressed to the same court, and that all the proceedings of the master purported to relate to a cause pending "in the Circuit Court, for the County of Washtenaw in Chancery," and not in "the Court of Chancery, of the State of Michigan, for the Second Circuit." The written evidence of all these proceedings denotes that the proceedings it describes pertained to the Circuit Court for the County of Washtenaw, in Chancery, and not to the other court, and they could

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not, in the present instance, be referred to the Court of Chancery of the State, for the Second Circuit, without disregarding the object of written records, and the purpose of specific appellations for the tribunals of the country. Indeed it seems reasonable that, in ascertaining which court was acting or addressed, we should be guided by the evidence furnished by the records, and should not reject the testimony they afford on the subject, upon the assumption that the proceedings of one court were carried on in the style of another.

But it is maintained, on behalf of Morton, that the public sale before mentioned was duly confirmed by the Circuit Court for the County of Washtenaw, in Chancery, on the 24th of September, 1853, when that court had complete jurisdiction by force of the act of 1851 (*L. 1851, p. 276,*) and that such confirmation was and is conclusive as to the rights of all parties to the suit, and all others claiming under them to the subject in controversy.

On recurring to the record, it will be observed that the action of the court, which is claimed to have been in confirmation of the sale, seems to have been an ex-parte order allowing a writ of assistance, and reciting that it appeared from the affidavit of Amos C. Blodget, that Rawson, who was in possession, had been served with a certified copy of the order confirming the master's report upon a sale of the premises, &c.

There are several reasons against giving to this order the effect imputed to it. First: There is nothing to show that Rawson appeared, or had notice of the application, while the circumstances tend to prove the contrary. Second: It is evident that it was not meant to pass upon the validity of the sale in allowing this order. Third: The recital or statement that an order of confirmation had been served, purports to have rested on affidavit, and on the opinion of the affiant as to what constituted a legal order of confirmation and a proper service, and the recital

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would therefore furnish no higher evidence that a confirmation was duly had, than would a similar affidavit at the present time; and Fourth: That as an order of confirmation was a pre-requisite to the order allowing the writ of assistance, a bare recital of the existence and service of the former could not establish the validity of the latter, or supercede the necessity of independent proof of the precedent order.

If the entry under date of September 19, 1853, is relied on as the order of confirmation mentioned by the deponent Blodget, in his affidavit, then, as that entry was made during vacation, without the actual cognizance of the court, but at the sole instance of the party, and at his peril, it could not have the effect of a real adjudication upon the validity of the antecedent proceedings, so as to make good all of such proceedings, and cure all the omissions, errors, and imperfections which had before occurred. We have no evidence that this entry was in the contemplation of the court, when the order allowing the writ of assistance was made, and to give to an entry, like this, made by the party in vacation, the extensive effect claimed for it, would, it is believed, be unsupported by precedent, and attended by very dangerous consequences.

These considerations require us to hold that the claim of Morton that the equity of redemption in the Dunn mortgage was barred, and that Edmonds, his grantor, acquired a complete legal title, by means of the foreclosure suit commenced in the old court, is not supported by the evidence.

There is still no question, however, but that by means of the circumstances stated in the pleadings, Newton Edmunds became invested with the ownership of the Dunn mortgage, and that by the conveyances to Morton, the latter succeeded to all the rights of Edmunds. But we are of opinion that the deed from Bishop to Edmunds, and the deeds to Morton from Lockwood and Edmunds,

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were wholly ineffectual as conveyances of the land, and were only operative in working an equitable transfer of the mortgages,

According to this view, the complainants, as subsequent mortgagees, are entitled to redeem the Dunn mortgage, and to demand its discharge. The complainants are also entitled to have an account taken, in the usual way, of the amount due and unpaid on that mortgage, and of the rents and profits of the mortgaged premises, chargeable in the usual course against Edmunds and Morton respectively, and to have any balance found against the latter persons on such accounting, applied on the mortgage, so far as necessary to satisfy it.

We are also of opinion that upon such accounting the defendant, Morton, should be credited as of December 29, 1849, with the sum of $53 for the costs taxed for proceedings up to the decree in the suit commenced in the old court, and that there should be applied on the mortgage as of the 26th of December, 1849, the sum of $100 paid by Rawson, in the said suit, to the solicitor for Edmunds. And we are further of opinion that if the accounting should establish a balance of rents and profits sufficient to satisfy the mortgage, or if the complainants should pay any amount remaining, and sufficient to satisfy it, that then the defendant, Morton, should be required to discharge the mortgage within some proper time, at the expense of the complainants; and, on the other hand, if upon the confirmation of the report, a balance should still remain unpaid upon the mortgage, and the complainants should fail to pay the same within some reasonable time to be fixed for that purpose, that then the bill should be dismissed as against the defendant, Morton, with costs.

The decree of the court below dismissing the bill as against the defendant, Morton, must be reversed, with costs, and the case must be remanded to such court, to

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be proceeded in, conformably to the principles which have been stated.

The other Justices concurred.

Foster v. People.

Accomplice: Cross-examination. An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he has shown himself guilty.

Larceny: Evidence. Evidence that a person charged with larceny has previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.

Heard April 9th. Decided April 27th.

Error to Macomb Circuit.

The defendant, in the court below, was tried and convicted upon an information charging him with larceny of a horse.

The errors assigned, and the facts bearing upon them, are stated in the opinion.

Newberry, Pond, & Brown, for plaintiffs in error.

1. Defendant, in court below, was tried in Macomb Circuit, for larceny of a horse. The Prosecuting Attorney having elected to try Foster separately, put the other prisoner, McCoy, upon the stand, and elicited from him a statement which tended to show the guilt of Foster, and proved conclusively his own guilt.

We were, therefore, entitled to the widest latitude in impeaching his credibility. He was asked, whether he had made an affidavit of a defence upon the merits, and the question was then asked, "What was that defence?" McCoy did not object to this on the ground that it

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would criminate himself, nor could he do so after the confession he had made. He was bound to answer everything in relation to the transaction. — *Greenl. on Ev. § 451; Alderman v. People, 4 Mich. 414; State v. Condrey, 5 Jones, Law, 418; State v. Foster, 3 Fost. 348.*

The evidence he gave would not be admissible against him. — *People v. Whipple, 9 Cow. 716.*

And upon doing this he is entitled to a *noll. pros.* of the information against him. — *1 Bish. Crim. Pro. § 507; 1 Philips on Ev. p. 107; United States v. Lee, 4 McLean, 103.*

The court erred in sustaining the refusal of the witness to answer. Although it is within the discretion of the court to limit the latitude of a cross-examination upon immaterial points, it is only where competent evidence is not excluded that no error lies.—*Rand v. Newton, 6 Allen, 38; Morein v. Solomons, 7 Rich. S. C. 97; People v. Blakely, 4 Park. 167.*

And where the evidence excluded is irrelevant to the issue. — *Grt. W. Turnpike Co. v. Loomis, 32 N. Y. 127; People v. Bodine, 1 Denio, 281; People v. Abbott, 19 Wend. 192.*

In all similar cases, where a new trial has been refused, the testimony sought to be introduced was immaterial, or related to some transaction entirely independent, and tending only to degrade the witness in the eyes of the jury. But the question in this case was entirely relevant. — *Kirschner v. State, 9 Wis. 140; Newton v. Harris, 2 Seldon, 345; Nye v. Merriam, 35 Vt. 438; Bersch v. State, 13 Ind. 434.*

The limits to which a cross-examination may properly extend, is no longer a question of doubt in this State. — *Campau v. Dewey, 9 Mich. 381; Chandler v. Allison, 10 Id. 460; Beaubien v. Cicotte, 12 Id. 459; Dann v. Cudney, 13 Id. 239.*

2. The rejection of Collyer's proposed testimony, as to

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whether the defendant had sought to purchase a horse of him within six months, was also erroneous.

The statements of a prisoner are admissible in his own behalf, when they are part of the *res gestæ*, or when they constitute a verbal act in themselves. — *Roscoe on Crim. Ev. 23, 89; Dillin v. People, 8 Mich. 357; Russell v. Frisbie, 19 Ct. 205; Powell v. Bagg, 8 Gray, 441; Boyden v. Moore, 11 Pick. 362; Marcy v. Stone, 8 Cush. 4; Simonds v. Clapp, 16 N. H. 222; 1 Greenl. Ev. § 108.*

The only question here is, Is it relevant? Does it tend to prove the prisoner's innocence? The theory of the prosecution was, that the prisoner conspired with others to steal the horse and sent it to Toledo for sale. Foster's defence was that he wanted a horse for his son; bought this one because he thought it cheap, and gave it to McCoy to exchange for a smaller one. Evidence that the defendant bought and sold horses as a business, would certainly be admissible to show that he bought this one in the usual course of that business. It seems equally clear that evidence that he wished to purchase a horse would tend to show that he purchased this one in good faith.

We submit that a new trial should be granted.

Dwight May, Attorney General, for defendant in error.

There are but two grounds of error alleged in the record.

1. That the court erred in refusing to direct the witness, McCoy, that it was his duty to answer the question, "What was that defence?"

a. McCoy was jointly charged in the information, with Foster, who was on trial; McCoy was a witness for the prosecution. He had been examined by the people, and gave testimony tending to show that Foster was guilty of the crime charged. On the cross-examination he was

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asked if he had not made an affidavit in that cause, for a continuance, in which he swore that he had a good defence, and was then asked, "What was that defence?" The prosecution objected, but was overruled by the court.

The witness then declined to answer, on the ground of the privilege, and was sustained by the court. While the court erred in its reason for the exclusion, the testimony was clearly collateral, and no error was committed which will authorize a new trial. — *Hilliard on New Trials, 211; Munro v. Potter, 34 Barb. 358.*

It could make no manner of difference with the issue then being tried between The People and Foster, what defence the witness had to the same or a similar charge. The witness was not then on trial, and so far as this question is concerned, it stands precisely as if Foster and the witness had been separately informed against. — *1 Wharton Crim. Law, 435; Waltzer v. State, 3 Wis. 785; Stranghan v. State, 16 Ark. 37; Cord v. Com. 14 B. Monroe, 386.*

It is well settled that a witness cannot be cross-examined as to any distinct collateral fact for the purpose of laying the ground for impeachment. — *1 Greenl. Ev. §§ 52, 448, 449; Harris v. Wilson, 7 Wend. 61; Plato v. Reynolds, 27 N. Y. 587; Carpenter v. Ward, 30 Id. 243; People v. McGinnis, 1 Parker Crim. R. 391; Dunn v. Dunn, 11 Mich. 283; Fisher v. Hood, 14 Id. 189; Com. v. Buzzell, 16 Pick. 157; Ware v. Ware, 8 Greenl. 29.*

b. It does not appear that the exclusion of the testimony prejudiced the rights of Foster in the slightest degree.

Unless he shows some error prejudicial to him, a new trial will not be granted. — *Hilliard on New Trials, 32, and cases cited.*

Nor will it be granted to correct a mere theoretical error. — *Munro v. Potter, 34 Barb. 361.*

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2. The only other error assigned is: That said court erred in refusing to permit the witness, George W. Collyer, to answer the question, "State whether defendant has sought to purchase a horse of you at any time during the past six months, and before the first of October last."

a. So far as anything appears in this record, this question was clearly immaterial and irrelevant to the issue.

b. The question called for the declarations of Foster, uttered six months before the alleged larceny. They were not a part of the *res gestæ* and were therefore clearly inadmissible. — *Dawson v. Hall, 2 Mich. 390; Oliver v. the State, 17 Ala. 587; Carter v. Buchanan, 3 Kelley, (Geo.) 513; Crosby v. Leary, 6 Bosw. 313.*

CAMPBELL, J.

The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse, and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People, as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt, in receiving the horse in Detroit, and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination, he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defense upon the merits. Counsel for Foster then asked what that defense was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defense. The court overruled this objection, and then the witness declined to answer. The record does not show on what ground the witness declined. The court refused to direct him to answer.

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Whether the witness had, or had not, such a privilege, it was not an objection which any one but the witness himself could raise upon the trial, and probably the court overruled it when made by the prosecution, on that ground, inasmuch as when made by the witness, it was allowed. Privilege from crimination, or the like, is no ground for refusing to allow questions to be put if not objected to by the party privileged. — *1 Greenl. Ev.* § *451; Roscoe Cr. Ev. p. 174; note to Thomas v. Newton, 1 Moody & Malk. 48; Com. v. Shaw, 4 Cush. 594; Southard v. Rexford, 6 Cow. 254.*

It cannot be reasonably claimed that the question was too irrelevant to be answered, even if such an objection could be taken by a witness. Any defense which he may have had against the charge could only have related to matters directly bearing upon what he had already testified to; because the charge was against both him and Foster, and anything throwing light upon any transaction connected with the history of the theft, from its inception to the arrest of the property in his hands, was receivable in evidence on the trial, and was properly received by the court. If excluded at all, it must be on some ground of privilege, which justified the witness in refusing to disclose the facts referred to.

Nor can it be regarded as unimportant, to enable the jury to appreciate the real character of the witness, as a reliable narrator. It has always been understood that the testimony of accomplices against a prisoner, should be scanned with jealousy; and in many cases it has been intimated that no conviction could properly be had upon that alone. We do not hold to this extreme doctrine, but leave the credit of such persons to the jury; yet the quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and if the position they occupy indicates moral turpitude, there is a necessity for

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more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it.

The witness not having given any reason for refusing to answer, we can only infer what reasons he might have had; and the only ones that have been suggested from any quarter are: first, his supposed right to keep to himself his communications with counsel relative to his defense; and, secondly, his right to avoid criminating himself in any way.

It has been suggested that the crimination which might be created by an answer to the question, would go beyond any liability upon the larceny, and apply on a charge of perjury, which might lie if he swore to facts making him responsible, and had before made an affidavit contradicting those facts. If any necessary contradiction was created by the affidavit, it is difficult to see how he could be put in any worse condition by explaining to what it referred. But it is unnecessary to consider that point here, because no such contradiction appears. The affidavit that he had a defense on the merits to this information agrees well enough with his testimony, because, while proving conclusively his guilt, he has, so far as his testimony is concerned, disproved any liability under this information, which charges an offence in Macomb county, while he swears to acts none of which were acknowledged to have been committed by him or by his procurement in that county. According to his showing, he could be held in Wayne and in Monroe, but not in Macomb.

The question, therefore, narrows itself to an inquiry whether, after undertaking voluntarily to explain the transactions connected with the larceny and the disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the pros-

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ecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of chat property, he can then refuse to answer further, and be protected against further disclosures relating to the same transaction.

No principle is better settled than that no inference can be permitted against a witness because he asserts this privilege.— *Carne v. Litchfield, 2 Mich. 340; Rose v. Blakemore, Ryan & Moody, 382; Ld. Elden, in Lloyd v. Passingham, 16 Ves. 64; Knowles v. People, 15 Mich. 409.*— This doctrine is necessary in order to make the privilege of any value. But the necessity of making the privilege effectual, renders it equally necessary to take care that where such protection would lead to absurd or unreasonable consequences, it shall not be allowed.

It would certainly lead to most startling results if an accomplice, who has made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could refuse to have his veracity, or fairness, or bias, or corruption, tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself from the criminal exposure; and it is of great importance to learn why such a course is adopted. If, in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty, by swearing away that of another, it can be completely prevented at the option of the witness himself, it would be difficult to justify the rule which allows co-defendants to be used by the prosecution at all, when they cannot be received for the defence. I

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cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself; and his protection from further disclosure on the same subject, is no protection whatever, because it cannot undo what makes the whole mischief.

The cases which apply to ordinary witnesses — who do not stand properly on the same footing with accomplices — do not in any way sanction such a stretch of privilege. It has been decided, and is the received doctrine, that a witness is entitled to decline answering, not only questions which directly criminate him, but also any questions which may apply to facts forming links in the chain of criminating evidence. And, where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point, and determine that he will go no further in that direction. He may judge that his protection does not require him to avoid replying concerning some facts, when as to others the tendency is, or seems to him, more direct and incriminating. Yet even this doctrine, upon the particular facts of the case, although the witness refused to answer the only question which applied directly to the guilt involved, was held in so much doubt in *Regina v. Garbett, Denison's Cr. Ca. 236; S. C. 2 Car. and Kir. 474*, that the Court of Exchequer Chamber was unable to agree on the first argument, and on the second argument, after some changes in the bench, the three chiefs of the courts, *Denman, Wilde, and Pollock*, and *Patteson, Coleridge, and Erle*, JJ. dissented from the other nine, and held the witness had gone too far to claim any further privilege. He had undoubtedly gone very far, but nevertheless he had not convicted himself, and the decision, while right in its principles, was also correct, as it would seem, upon the facts. As no opinions are reported, we cannot ascertain the precise views of the judges, who do not seem to have agreed as to how far the witness had claimed his privilege. But the rule which allows a witness to refuse

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answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result, that an answer concerning it may supply means of conviction, by aiding the other proofs which it indicates, or supplements, on behalf of the prosecution. The right to decline answering as to these minor facts, is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted; and must be regarded as waived when the objection to answering to the complete offense is waived. The law does not endeavor to preserve any vain privileges; and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. This distinction between the cases where a witness has or has not furnished sufficient evidence to criminate himself, is clearly recognized in *Amherst v. Hollis, 9 N. H. 107,* and in *Coburn v. Odell, 10 Foster, 540,* as well as incidentally in numerous other cases, which hold that when he has once made a decisive disclosure, his privilege ceases. And the further cosnsideration is also recognized, that a witness has no right, under pretence of a claim of privilege, to prejudice a party by a one-sided or garbled narrative. As Mr. Phillips very neatly expresses it, "A witness may waive his privilege and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer, or to refuse to answer any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not

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be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party." —*2. Phil. Ev.* (*Edward's Ed.*) *935.*

Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, bnt must disclose fully what he has attempted to relate. This view is adopted by the text writers, and is very well explained in several of the authorities, where the principle is laid down and enforced.— *1 Stark. Ev. 206, (9th Am. Ed.); Roscoe's Cr. Ev. 174; 1 Greenl. Ev. § 451; 2 Phill. Ev. 935, 2 Russ. Cr. 931; Coburn v. Odell, 10 Foster, 540; State v. K. 4 N. H. 562; State v. Foster, 3 Foster, 348; Foster v. Pierce, 11 Cush. 437; Brown v. Brown, 5 Mass. 320; Amherst v. Hollis, 9 N. H. 107; Low v. Mitchell, 18 Maine, 372; Chamberlain v. Willson, 12 Vt. 491; People v. Lohman, 2 Barb. S. C. 216; Norfolk v. Gaylord, 28 Conn. 309.*

In *Foster v. Pierce, 11 Cush. 437,* it is held that where a witness knows in the beginning that his testimony in the case must expose him to a criminal charge, he must claim his privilege in the outset, or waive it altogether. And, as applied to cases in which that is the gist of the inquiry, this rule appears to be necessary and just, to prevent partial and unfair statements. It is probably not designed to apply to any others.

When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them, if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent,

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while under a joint indictment; and, if not indicted, they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can, in any case, allow to them any privilege whatever, when they have gone so far already, as to any matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matters under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges. — *2 Russ. Cr. 927.*

Even on the principles applied to ordinary witnesses, they would not be protected, as we have seen, after making any conclusive disclosure. They come upon the stand for no other purpose, and they have never been allowed, under such circumstances, to stop short of a full disclosure. And no privilege is recognized as then belonging to them. — *Alderman v. People, above cited; 2 Phil. Ev. (Edw. Ed.) 930; note; 2 Russ. Cr. 927; Com. v. Price, 10 Gray, 472; State v. Condry, 5 Jones L. R. 418; Brown v. Brown, 5 Mass. 320; 2 Phil. Ev. 936.*

The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defense, as alluded to in his affidavit for continuance.

The other error assigned was that the court ought not to have refused to allow the respondent to prove that, within the previous six months, and before the time of the theft, he had applied to the witness, Collyer, to purchase a horse. This was to coroborate a defense set up, that respondent purchased the horse alleged to have been stolen.

We cannot perceive how a desire or offer to purchase a horse tends to prove that a person did not subsequently steal one. Even the most inveterate thieves must

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sometimes purchase articles; and the fact that they do so would not at all interfere with their misconduct as to others. The evidence was clearly inadmissible, and its rejection was proper. But for the other error there should be a new trial.

The other Justices concurred.

Samuel C. Kanady et al. v. William H. Burk.

Agreement to hold stock: Default to keep margin good: Waiver. The testimony tended to show that plaintiff, on April 18, 1868, employed defendants to purchase certain stock, and to hold it until he ordered it sold. That he paid $750 down, and soon after gave his check on the bank for $250 to keep the margin good; that the check was never paid, and the margin was not kept good. That defendants notified plaintiff they would sell if he did not make it good. That defendants, at plaintiffs' request, agreed to hold the stock until the 18th of May, in the morning; that plaintiff then called at one o'clock, at which time defendants insist that they told plaintiff he would sell; that defendants, as insisted by plaintiff, then agreed to wait until plaintiff returned from his dinner at two o'clock. Defendant sold the stock at a loss before plaintiff returned. Plaintiff returned at two o'clock, but made no tender of performance.

The court charged the jury, that if defendant notified plaintiffs, as claimed, and that afterwards they agreed with plaintiff to wait until Monday, and that on Monday at one o'clock, another arrangement was made to wait until after the plaintiff's dinner, that plaintiff was entitled to a reasonable time to make a sufficient deposit, and that two o'clock was such reasonable time.

That, if the original agreement was, as insisted by the defendants, that they might sell if no margin was put up before Monday, the performance of it was waived by the agreement to wait until plaintiff returned from his dinner.

Held, erroneous. The question was not one of waiver, but whether a distinct agreement was entered into subsequently to, and which varied the terms of the original contract, and which would preclude defendant from selling except under the new agreement. Assuming the defendant's version of the contract, plaintiff had been in default twice. Defendants had notified him of it, and that they must sell the stock unless he made the margin good. If plaintiff acted in good faith in getting the postponement, it must have been to obtain a further deposit.

This was an agreement then made after plaintiff was in default to delay the sale for a definite period, and to take the risk of plaintiff's ability to protect them from loss.

Assuming that defendants were under obligations to wait until two o'clock, it does not follow that they incurred any liability by making sale earlier, unless some further act was done by plaintiff.

Heard April 22, 23. Decided April 27.

Error to Wayne Circuit.

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KANADY ET AL. v. BURK.

This was an action of assumpsit, brought to recover damages for an alleged breach of a contract to purchase certain shares of stock. The declaration contained special counts, and the common counts.

Judgment was rendered for plaintiff.

The facts are stated in the opinion.

L. Barbour, and *Hoyt Post*, for plaintiff in error.

The court erred in fixing the measure of damages in his instructions to the jury. The plaintiff below could only recover at all upon one of three hypotheses of fact, viz:

First. That the original contract was, as testified to by by plaintiff, viz: "That defendants, for the sum of $750, were to purchase for and on account of plaintiff one hundred shares P. M. stock, and hold the same for him until he should order them to sell." The testimony tended to prove a breach of such a contract, if made. The court seems to have adopted the rule applicable to a contract to sell and deliver goods at some future day, certain. This was error.

There is no just distinction between stock and merchandise in the application of the rule for damage. — *Sedg. on Dam. pp. 294, 310.*

The market value on the day of the breach controls the measure of damages. The first question to be determined is, when was the contract broken. A distinction may, perhaps, be made between a contract to deliver a specific article, and one merely to deliver a certain quantity of a given class. In the former, if the vendor parts with the specified article before the day of delivery, he has broken the contract then and there, and put it beyond his power to peform; but in the latter the contract can only be broken on the day of delivery.

This is a contract to purchase and hold. This contract is a continuing one, and the sale of the stock was a completed and irreparable breach. Nothing but a substituted

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peformance was thereafter possible. The damages are to be estimated with reference to the state of things existing at the date of the breach, which, in this case, we claim was on the 18th, and not on the 26th.

The plaintiff had notice on the 18th, at two o'clock, an hour before the sale actually occurred, that the order to sell had been sent; and immediately on the receipt of the telegram, at three o'clock, the stock had been sold. He was notified of the fact, and a statement of his account with defendants was sent him.

The contract then set up by plaintiff was broken on the 18th, instead of on the 26th, and the change in price was not the natural or proximate result of the breach of the contract. — *3 Mich. 55.*

In a contract to sell and deliver, the vendor, refusing to perform, retains the goods, and if the market value has risen he has compensation in the enhanced value of the goods. But here the defendants get nothing but their commissions, and whether the stock rises or falls in the market, they neither gain nor lose by it.

We insist, then, that under such a contract, the only risk assumed by the defendants was, that they should sell at the market price, and that the plaintiff should have prompt notice thereof, or that they should make good the deficiency, if any, to the plaintiff.

On the other hand, the plaintiff's duty, upon notice of the sale, was to take all reasonable measures to protect himself from any increase of damage happening from any future changes in price. Any change in price subsequent to his receiving notice of the sale, and after the lapse of a reasonable time in the ordinary course of business to repurchase the stock, was at his own risk, and not that of the defendants. This, the evidence shows, he could have done, at least, on the 19th. — *Sedg. on Dam. (4th Ed.) 103; Blanchard v. Ely, 21 Wend. 342; Darwin v. Potter, 5 Denio, 306; Miller v. Mariners' Church, 7 Greenl. 55;*

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Hardern v. Dalton, 1 Car. and Payne, 181; Davis v. Fish, 1 Iowa, 407; Loker v. Damon, 17 Pick. 284; Thompson v. Shattuck, 2 Met. 615.

Second. That the original contract was as testified to by defendants, and that such contract had not been varied by any subsequent agreement.

On this hypothesis it was conceded that the plaintiff could not recover at all on the special counts, but could recover only, upon the count for money had and received, the sum admitted by defendants, in their plea, to be due him.

Third. That the original contract was as testified to by the defendants, but that such contract was either waived by the defendants, or was varied by a subsequent agreement of the parties on the 18th.

On the question of waiver, we insist that the extent to which the testimony tends to show anything resembling a waiver, was that of a voluntary suspension of the defendants' right to sell, from time to time, until the 18th, and that the plaintiff acquired no new rights thereby. And no matter that defendants had theretofore, without consideration, voluntarily failed to exercise the right to sell, in the absence of any valid agreement to continue such temporary suspension of this right, how could that affect their authority to exercise such right on the 18th, when they are no longer willing to suspend it? There was no such waiver, or agreement to waive, as could change the measure of damages.

On the subject of the agreement, at one o'clock, to hold the stock until after dinner, or until two o'clock, we insist that this agreement, if any was made, could only be material if the original contract was as claimed by defendants, and that the measure of damages for a breach of this agreement, would be as suggested by defendants' request to charge. Certainly such an agreement could have no relation whatever to any rule of damages

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based upon the value of the stock on the 26th. There was no tender or offer to perform by plaintiff after dinner.

There was no consideration for the new agreement.—*Ford v. Adams, 2 Barb. 349.*

If the contract were as defendants claimed, they had the right to sell without notice.

In the instruction upon which the third assignment of error is based, there was error; inasmuch as it presupposes a different contract than the one the plaintiff claimed to have made.

Moore & Griffin, for defendant in error.

From the testimony of Taylor, plaintiffs in error had not insisted upon a strict performance of the agreement, as they claimed it.

They might have sold out the stock at once in default of the payment, "in a day or two," of the $250.

In lieu thereof, they accept a check from the defendant in error,

When they ascertained that the check was not good, instead of returning it, and insisting on a further advance of money, they held it, even up to the day of trial.

As May 18th approached, they became more urgent, and finally on that day threatened to sell, unless further advances were actually deposited.

1. If the defendant in error had, at the interview, immediately before dinner, offered an advance of money, it would have been incumbent on plaintiffs in error to have accepted it, and held the stock.

There had been no such breach as would justify them in refusing so to do.

The agreement to wait until after dinner, was simply a waiver as to time. Under the circumstances, it must be considered a waiver before breach.

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In this view it would operate as an equitable estoppel to prevent the strict performance of a contract. — *Note to Foster v. Dawber, 6 Excheq. 854.*

Plaintiff in error extended the time; defendant acting upon such extension, delayed making a further advance, and was ready at the time last fixed. The law will not permit plaintiffs to take advantage of a delay expressly sanctioned by them.

2. Again, admitting that a breach had occurred, it was not necessary that there should be any consideration for the waiver, other than that arising out of the original transaction. — *Fitch v. Woodruff & Beach Iron W. 29 Conn. 82; Hansen v. Kirtleg, 11 Iowa, 565; Van Buskirk v. Murden, 22 Ill. 446; M'Pherson v. Neuffer, 11 Rich. (S. C. Law R.) 267; Fox v. Harding, 7 Cush. 516; Emerson v. Cogswell, 16 Maine, 77; Savage Manuf'g Co. v. Armstrong, 17 Id. 34.*

The deposit after dinner was to be accepted as a full performance of the contract.

Evidence of waiver will support an allegation of performance. — *Holmes v. Holmes, 9 N. Y. 525; Moore v. Detroit Locomotive Works, 14 Mich. 266; Boutwell v. O'Keefe, 32 Barb. 434; Holbrook v. Bassett, 5 Bos. 147, 429; Young v. Hunter, 6 N. Y. 203; Carman v. Pultz, 21 N. Y. 547; Moses v. Bierling, 31 Id. 462; Clark v. Meigs, 10 Bosw. 337.*

3. As to the measure of damages, counsel cited — *Shepherd v. Johnson, 2 East, 211; M'Arthur v. Seaforth, 2 Taunt. 263; Downer v. Back, 1 Starkie, 318; Harrison v. Harrison, 1 Car. & P. 412; Greening v. Wilkinson, Id. 625; Archer v. Williams, 2 Car. & Kir. 26; Williams v. Archer, 5 Man., Gr. & Scott, 318; Owen v. Routh, 14 C. B. (5 J. Scott,) 327; Gainsford v. Carroll, 2 Barn. & Cres. 624; Shaw v. Holland, 15 Mees. & Welsby, 155; Cortelyou v. Lansing, 2 Cai. Cas. 200; West v. Wentworth, 3 Cow. 82; Clark v. Pinney, 7 Id. 61;*

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Kortwright v. Buffalo Com. Bank, 20 Wend. 91; Com. B'k of Buffalo v. Kortwright, 22 Id. 348; Davis v. Shields, 24 Id. 322; Smith v. Griffith, 3 Hill, 333; Allen v. Dygert, 3 Id. 593; Blot v. Boiceau, 3 N. Y. 78; Arnold v. Suffolk, 29 Barb. 424; Andrews v. Clarke, 3 Id. 585; Romaine v. Van Allen, 26 N. Y. 309; Scott v. Rogers, 31 Id. 676; Daborick v. Emerie, 12 Cal. 171; Maher v. Riley, 17 Id. 415; Randon v. Barton, 4 Tex. 289; Calvit v. McFadden, 13 Id. 324; Kent v. Ginter, 23 Ind. 1; West v. Pritchard, 19 Conn. 212; The Bank of Montgomery v. Reese, 26 Penn. St. 143.

In most of the authorities, the principle is based upon the fact of advance payment, and is said to apply equally to merchandise as to stock.

Other authorities make a distinction between stock and merchandize.—*23 Ind. 1, and 26 Penn. St. 143, above cited; Sedgw. on Dam. chap. 10.*

But the argument thus far assumes that the breach occurred on the 18th May.

We think this is not correct.

It is true plaintiffs notified defendant that they had sold his stock.

But it must be remembered that they bought and sold as brokers. Defendant's shares were not at all distinguishable from other shares.

Plaintiffs could have replaced the stock, and defendant would be bound by such action.—*Nourse v. Prime, 4 Johns. Ch. 490; Nourse v. Prime, 7 Id. 69.*

Defendant did nothing to rescind the contract, but insisted that he should abide by it.

This gave plaintiffs a fair opportunity to make it good. The breach did not occur till order was given.—*Leigh v. Patterson, 8 Taunt. 540.*

The plaintiffs had the money of the defendant, and it was their duty to hold until instructions to sell.

They were in the market, and could buy at any time,

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and ought to have done so, and thereby been ready to perform the agreement on their part.

COOLEY CH. J.

Burk sued Kanady & Taylor, who were brokers in Detroit, for the breach of a special contract, to purchase and hold for him a hundred shares of Pacific Mail stock. The contract, whatever it was, was not reduced to writing, and Burk sought to prove it by his own evidence, which was as follows:

That on April 18, 1868, Kanady and Taylor agreed with him for the sum of seven hundred and fifty dollars to purchase for him a hundred shares of Pacific Mail Stock, and hold the same until Burk should order them to sell. The agreement was an oral one, and nothing was said about commissions, or interest, or margin, or expenses, but Burk had before that time had dealings with them, as well as with others, in stocks, and supposed he was to be charged with commissions, and that they were to advance the balance of the money to purchase the stock, and charge him legal interest. He paid them the $750, and subsequently they sent him a statement of the purchase of the stock at $9450 or 94½ per share, with a charge of $25 for commissions, adding, at the bottom, "To your credit as margin against the above stock $750." Burk further testified that on May 26, 1868, Pacific Mail stock was at $98, and he then sent his brokers a written order to sell at once, and they replied in writing that the stock was sold at 90 net on the 18th, and statement rendered. This evidence constituted the plaintiff's case.

The defendants, on the other hand, gave evidence tending to show that the agreement was that Burk should pay them, as a margin, ten per cent. of the par value of the stock, $750 to be paid down, and $250 in a day or two;

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that he should pay all expenses of the purchase and sale of the stock; that he should keep good in their hands a margin of five per cent. on the par value of the stock; that he should pay them interest at ten per cent. on an amount equal to the par value, less the margin deposited; that he should pay them one-eighth of one per cent. commissions for themselves, and a like sum for their New York brokers, on the purchase, and a like sum to each on the sale; that on these terms they made the purchase by telegraph; that they made repeated demands upon Burk for the $250 he was to pay in a day or two, but failed to obtain the same. and also made repeated demands for more margin on said stock, without result; that on May 6, 1868, Burk gave them his check on a Detroit bank for $250, as additional margin, pursuant to the agreement, but on presentation at the bank, payment for this check was refused, and though they presented it several times afterwards, prior to May 16, 1868, the result was the same, and they never collected or received anything upon it; that Burk was repeatedly requested to make the check good at the bank, and to put up more margin, and that on Saturday, May 16, 1868, they notified him in writing that it would be impossible for them to carry the stock any longer unless he put up more margin.

They further gave evidence to show that in response to this notification Burk came to their office, and said to them he could not put up any more margin, because he had no more money; that they replied they must have more margin, or they could not carry the stock any longer, but that finally they said, as it was then too late to sell that day, they would hold the stock until the next Monday morning, but that on Monday they would have to sell. On Monday morning they had another interview with Burk, and insisted again on his putting up more margin on said stock, and informed him unless he did so, they would be obliged to sell the stock to protect

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themselves from loss; that Burk again expressed his inability to put up more, and on presentation of his check at the bank just before noon of that day, payment was again refused; that the stock was then down to 90¾, and defendants then had in their hands a margin of only about one and three-fourths per cent.; that about one o'clock that day, Burk, on his way to dinner, stepped into their office, and said to defendant, Taylor, in reply to his demand for more margin, "If you must sell, sell; if it goes to 90 sell any way. I wish you would hold it till I get back from dinner;" to which defendant Taylor replied, "I can't hold it; it may be too late to sell to-day. We have held it much longer than we ought to." That Taylor then had his dispatch to New York brokers, ordering a sale, written out and in his hand ready to send; that he said nothing to Burk about this, but told him he was going to sell immediately, and at once on Burk leaving the office, Taylor sent off the telegram to the New York brokers, who made sale of the stock at three o'clock that afternoon, at 90⅛; that on his return from dinner, Burk again came in to inquire about the stock, and Taylor informed him it had been sold, whereupon he replied that they had no right to sell the stock; that he was ready and willing to give more margin, and had made arrangements that morning, at the bank, to make his check good; that his check was good that afternoon, and if the stock went up, he would send them a written order to sell, and sue them for the loss.

They gave further evidence to show that about three o'clock on that day, on receiving a dispatch from the New York brokers, announcing the sale, they sent Burk a statement of account showing due him $174.31, which statement he returned, but subsequently drew from them $125 of this sum.

It is quite apparent that this evidence, on the part of the defendants, tended to establish a very different contract from that sworn to by the plaintiff, at the same

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time that it fully justified all that they had done under the contract, if its terms were as they claimed them to be. To rebut the defence, the plaintiff introduced evidence tending to show that the said check of $250 was not given in pursuance of the original agreement, but, at the solicitation of defendants, was afterwards given by him voluntarily, for them to hold as security in case the stock went so low as to exhaust the $750 already in their hands, and without any expectation on his part that the check would be presented for payment, but with the express understanding that it should not be so presented, and that he never knew it had been presented until May 16th; that nothing was said by defendants in their note of May 16th, nor in the interview with them on that day, about selling the stock, but that defendant Taylor promised to hold the stock until Monday morning; that on that morning, Burk was in negotiation for a discount at the First National Bank, and soon after the bank closed, at noon, obtained from the cashier his consent for a discount of $400; that his check for $250 was good at two o'clock on that day; that on coming down from his office to go to dinner at about one o'clock, he stepped into defendant's office, and asked defendant Taylor if there was any further dispatch, to which Taylor replied there was not; that he then said, "Very well, Taylor, will you hold that stock until I get back from dinner?" To which Taylor replied, "Yes, we get no telegram between this and 3 o'clock this afternoon, and I will hold it until you get back from dinner." That Burk said to him, "I wish you would," and went to his dinner; that when he came back from dinner, he said to Taylor, "Well, Terry, any further dispatch from New York?" To which Taylor replied: "No, sir, but I sold your stock." That Burk then said, "Terry, you told me you would wait until I got back from dinner." To which Taylor replied, "Well, I took my chances, and I sold your stock." That Burk then said: "Very well; you

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will have to suffer the consequences;" that Burk did not give any order to sell; and that no such conversation as related by defendant, Taylor, occurred at one o'clock on the eighteenth day of May, but that the conversation as here given, was the conversation both before dinner and at two o'clock.

This being the state of the case upon the evidence, the Circuit Judge proceeded to address the jury upon the law, and instructed them, if they should find the original agreement to be as stated by the plaintiff, then the defendants were not entitled to sell the stock, except upon the order of the plaintiff, until the depreciation, the accrued interest and the commissions had exhausted the sum of money deposited.

He further charged them that if they should find that, on Saturday, May 16th, defendants sent plaintiff a note, stating that they would not carry the stock any longer unless a deposit was made, and, in consequence of that, plaintiff saw the defendant, Taylor, and had a conversation with him concerning it, and an agreement was entered into whereby defendants were to wait until Monday, and, on Monday, another arrangement was made by which they were to wait until after dinner, then the plaintiff was entitled to a reasonable time to make the additional deposit, and under the evidence in the case, two o'clock in the afternoon was within such reasonable time.

He further charged them that if the agreement was as stated by defendant, Taylor, the performance of it according to its strict terms was waived by the agreement to hold until after the plaintiff returned from dinner on May 18th, (if the jury believe the latter agreement was made) and defendants were not authorized to sell the stock at the time it was sold.

And the judge refused to charge, as requested by defendants, that if the jury should find that, in the conversation between Burk and Taylor at or about one o'clock in

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the afternoon of May 18th, Taylor agreed that defendants should not sell the stock until two o'clock, or until Burk returned from dinner, then such agreement was void for want of consideration.

From this statement of the charge it is evident, we think, that the Circuit Judge misconceived the legal effect of the conversation between Taylor and Burk, assuming it to have been as stated in the evidence of the plaintiff. The Circuit Judge treated the question arising upon it as if it were one of waiver only; whereas, an examination of the case on the theory on which, in respect to that conversation, he put it to the jury, will show that the question involved was not one of waiver, but was whether a distinct agreement was then arrived at between the parties, which varied in important particulars the terms of the original contract, and which would be binding upon the defendants and preclude their selling the stock thereafter, except in accordance with the understanding by the new agreement.

The instructions to the jury in respect to the legal effect of that conversation were given on the theory that they might find the original bargain to be as stated by defendants, and had no application to the case if they found the contrary, as in that event the plaintiff would not have been in default, and there would have been nothing for the defendants to waive. But assuming the bargain to have been as defendants claimed, then there had been a default on the part of the plaintiff, from the time when he had failed to pay the $250 as agreed, and a second default occurred when the stock fell so low that they did not have in their hands a margin equal to five per cent. on the par value of the stock.

Whether, when the stock went down so that the stipulated margin did not remain, the defendants were bound, before selling, to notify the plaintiff of the fact, and to demand a further deposit; or whether, on the other hand, the plaintiff was bound at his peril to watch the fluctua-

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tions of the market, and keep his margin good, we do not feel bound, upon this record, to express an opinion. It clearly appeared in the case that the plaintiff was notified of the fall in the market price, and we think the evidence on both sides shows that defendants were insisting upon their right to a further deposit, and that their note to the plaintiff on May 16th fairly apprised him that they expected to sell, for their own protection, unless he made his margin good. We cannot otherwise understand their communication as stated by the evidence on both sides, and the plaintiff apparently acted on this understanding. In his interview with them on May 16th, he induced them to delay further action until May 18th; and at one o'clock of that day, according to his statement, he secured a further promise that a sale should not be made for another hour. If this was in good faith on his part, it must have been to make arrangements for a further deposit, as no other purpose is apparent or is suggested.

Now, so far as these promises of defendants related to the past, and went to absolve the plaintiff from any liability for a failure to perform his agreement at any time before the promises were made, there is ground to claim that they might legally operate as a waiver; and had plaintiff afterwards, and before the sale, made good his margin, there could have been no doubt that the waiver would have been effectual to heal any previous breach of the contract. It is not, however, as a waiver of a right of action or of a forfeiture, that the plaintiff relies upon these promises, but he treats them as the foundation of a new right, and the present action is substantially based, not upon a failure of the defendants to perform the original contract, but upon the breach of the new agreement.

The new agreement seems to have been regarded by the plaintiff as one merely waiving strict performance by him; but in so far as it looked to the future, it was an agreement to give further time, and it needed a consid-

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eration to support it. Like any other contract without a consideration, it was mere *nudum pactum*. But it was also something more than an agreement to extend time. Under the original contract defendants had in their hands a remedy for any breach of the agreement, which, under ordinary circumstances, would have been completely effectual in its provision for indemnity. On a falling market they were not obliged to wait until the margin was exhausted, but might sell for their own protection when anything less than five per cent. remained in their hands. This arrangement did not leave them to rely upon the pecuniary responsibility of the party for whom they bought, nor would it leave them to take the risk of the fluctuations of the market unless those fluctuations should prove greater and more rapid than was anticipated by the parties as probable when they made their contract. When, therefore, we are told that the defendants agreed, after the plaintiff had been for some time in default, and after the margin had become nearly exhausted, to delay making sale for any definite period thereafter, however short, we must understand that they agreed also, in effect, to take upon themselves in the meantime the risk of the plaintiff's responsibility being adequate to protect them against any loss consequent upon a further depreciation of the stock.

There is no analogy between this case and that of *Moore v. Detroit Locomotive Works, 14 Mich. 266*, where parties waived a strict compliance with an agreement, and accepted as performance that which fell short in important particulars. In the present case it is not sought to hold a party to an accepted performance, but to bind him by the terms of an alleged promise which looked to performance in the future, and which was based upon no consideration whatever.

But if we thought otherwise on this point, we should still regard the charge of the judge as erroneous. Assum-

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ing that the defendants were under obligation to wait until two o'clock before making sale, it will not follow, we think, that they incurred any liability by making sale earlier, unless some further act was done by the plaintiff. Although it is not so stated in express terms, yet, as we have before said, the only legitimate inference is that the time was to be given to enable him to make good his margin, and if he failed to make it good, he has no ground of legal complaint. When he came back at two o'clock, the stock was, in fact, not sold, though the defendants supposed it was, and so informed him. It may be that had he then tendered the proper margin, the sale would have been countermanded. Assuming, however, that he had a right to suppose the sale already made, yet we think we are at liberty to infer from what appears in this record, that it would have been easy for defendants at once to replace the stock by purchase, had plaintiff insisted upon their doing so, and tendered performance on his part; and we cannot assume that they would not have done so had the tender been made. The plaintiff made no such tender. He does, indeed, inform us that at that time his check of $250 had become good, but this was not sufficient to make up the margin to five per cent., nor does it appear that he offered to pay even this. He assumed that the failure of defendants to keep their promise to extend the time for performance had given him a right of action, notwithstanding he had not performed, or offered to perform, within the time as extended. This, clearly, is an erroneous view of the law. The extension was for the purpose of giving him time to perform; and on his own theory of the case, unless the defendants had put it out of their power to keep the agreement on their part by purchasing, if necessary, and holding for him the amount and kind of stock specified, he has not put them in legal default until he has tendered the proper margin. Instead of a sale of the particular one hundred shares

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putting it out of their power to perform, we have a right to infer that it would have been as easy to replace the stock as it would have been to replace a hundred bushels of any ordinary marketable grain.

We think, therefore, that the verdict, which gave the plaintiff the value of the stock on May 26th, should be set aside and a new trial granted.

Some of the exceptions taken on the trial relate to the rule of damages, but these become unimportant, unless the jury, on a new trial, should sustain the plaintiff's theory of the original contract as stated in his evidence in chief. As, however, his rebutting evidence would seem to indicate his understanding that defendants were entitled to a further margin, we do not feel called upon to discuss the rule of damages on this record. And we feel the greater liberty to refrain from such discussion since the contract involved, though perhaps legally binding, is yet separated from clearly illegal wager contracts by distinctions so faint and shadowy, that it cannot entitle the parties to demand from the court any larger share of attention than is absolutely necessary to a settlement of their legal rights as they depend upon the particular record before us.

The other Justices concurred.

Squire C. Merrill v. Stephen W. Butler.

Declaration: Jurisdiction. The jurisdiction of the Circuit Court depends upon the amount claimed in the declaration. — *16 Mich. 484: 3 Id. 466.*

Replevin: Assessment of value. In replevin, when the property has been delivered to the plaintiff, and he recovers a verdict, there is no authority given by the statute either to the court or the jury to assess the value of the property so replevied.

Replevin: Costs. Under the Statute, *Comp. Laws*, § 5597, the plaintiff is entitled to costs, without reference to the value of the property, whenever he recovers judgment upon verdict in an action of replevin.

Heard April 22. Decided April 27.

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MERRILL v. BUTLER.

Error to Wayne Circuit.

This was an action of replevin. The property was delivered by the sheriff to the plaintiff below. The jury rendered a verdict for plaintiff for $10.00; but there was no assessment of the value of the property, either by the court or jury. Judgment was thereupon entered for plaintiff, with costs.

Fred. A. Baker, for plaintiff in error.

1. Justices of the Peace have exclusive jurisdiction in all actions of replevin where neither the value of the property nor the damages for taking and detaining it, exceed the sum of one hundred dollars. — *Const. Art. VI, § 18; Comp. Laws, § 3695.*

The jurisdiction of a court must be determined from the record; and where it depends on amount, by the sum claimed in the writ or declaration. But where the plaintiff claims in his writ or declaration an amount sufficient to give the Circuit Court jurisdiction, and only recovers a sum within the exclusive jurisdiction of a justice, costs will be given to the defendant. — *Strong v. Daniels, 3 Mich. 466; Inkster v. Carver, 16 Id. 484; Comp. Laws, § 5597, subdiv. 4.*

It will be observed that by the statute the plaintiff is entitled to costs in all actions of replevin in which he recovers judgment. But the principles of construction, adopted in actions brought for the recovery of any debt or damages, are, by parity of reason, equally as applicable to the action of replevin; for the value of the property replevied is synonymous with damages, at least for the purpose of determining a question of costs. — *Small v. Bixley, 18 Wend. 514.*

But who shall determine the question of value — the court or the jury?

There is no provision of the statute expressly authorizing the jury to assess and find the value of the property,

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even in cases where it is not seized and delivered to the plaintiff. The practice in this respect is based upon section 30, chap. 152, pp. 1335 of the compiled laws, which implies by the words "as the same shall have been assessed," that the value of the property should always be determined by the jury. See also section 34 of the same chapter. But, perhaps, the correct theory is to have the court determine the value where it only affects the question of costs, as is necessarily the case where the property is replevied, and the plaintiff recovers judgment. — *Comp. Laws, § 5636, p. 1468; Davis v. Freeman, 10 Mich. 188.*

The decision of the Circuit Judge, awarding costs to the plaintiff, was conclusive evidence to the taxing officer, but this court possesses the power to review upon a bill of exceptions the grounds upon which the decision was made. — *Barney v. Keith, 6 Wend. 555; Commonwealth v. Merrill, 14 Gray, 418; Chase v. Breed, 5 Id. 443.*

Geo. H. Prentiss, for defendant in error.

1. The amount specified in the declaration as the value of the property, and the damages claimed exceeding $100, the Circuit Court had jurisdiction on the pleadings. — *Inkster v. Carver, 6 Mich. 484; Strong v. Daniels, 3 Id. 406.*

2. The Circuit Court, having jurisdiction in the case on the pleadings, the plaintiff has a right to costs, whatever might be the value of the property.

The statute gives costs in all cases of replevin. — *C. L. § 5597.*

a. It is plain, from the association of this action with other actions in this section, that costs follow the judgment in replevin, independent of the amount of damages or value of the property.

b. We respectfully submit that there is no rule of law requiring the plaintiff or allowing the defendant to have the value of the property assessed, where the plaintiff, as

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in this case, does not wish it, nor ask for it, and has had the property delivered to him. — *2 C. L. chap. 152; Laws of 1855, p. 325.*

The defendant in certain cases may have the value assessed. — *2 Comp. L. § 5038.*

So may the plaintiff. — *Ibid. 5034.*

3. If it were necessary or proper to have the judge fix the value of the property, and to find it worth more than $100, we submit that there was evidence tending to show such value.

It will be presumed that the Judge properly weighed the evidence.

Error will not be presumed, but must be made to appear affirmatively. — *Cooley's Dig. 1562.*

4. But the defendant below is concluded by the fact that he took no exceptions to the rulings of the judge now complained of. — *Sweetzer v. Mead, 5 Mich. 109.*

CHRISTIANCY J.

This was an action of replevin in the Wayne Circuit. The property was seized upon the writ, and delivered to the plaintiff below. It was appraised by appraisers under the writ at $225, and the declaration alleged it to be of the value of five hundred dollars. On the trial, some testimony was given by which it appeared doubtful whether the value exceeded one hundred dollars. The counsel for the defendant below, requested the court to instruct the jury to assess the value of the property, though they might find a verdict for the plaintiff. This the court declined to do. A verdict was found for the plaintiff, and judgment rendered against the defendant for damages and costs, the court also refusing to assess the value of the property.

Plaintiff in error insists that either the court or the jury should have assessed the value of the property, and if found to be less than one hundred dollars (the limit

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of a justice's jurisdiction in replevin,) costs should have been awarded to the defendant below, instead of the plaintiff.

It is not denied that the jurisdiction of the Circuit Court depended on the amount claimed in the declaration. —*Inkster v. Carver, 16 Mich. 484; Strong v. Daniels, 3 Id. 466.*

The statute very clearly gives no authority, either to the court or jury, to assess the value of the property in a case where the property has been delivered to the plaintiff, and he recovers a verdict for it. And the fourth subdivision of section 5597 *Compiled Laws*, gives costs to the plaintiff in all actions of replevin, when he recovers a judgment upon verdict, without reference to the value of the property. We see no remedy for the defendant against such costs, without further legislation.

The judgment must be affirmed, with costs.

The other Justices concurred.

Walter Goodenow v. Thomas Curtis.

Contract: Fraud: Description: Possession. Complainant entered into an agreement with defendant to purchase of him the 'Knapp House property," so called.

The defendant at the time was the owner of a certain triangular piece of land which he purchased of one Knapp, together with several other lots, all of which had been used and occupied as one piece, and been enclosed by a fence for several years before, and which enclosed piece had long been known as the "Knapp House property."

During the negotiation, defendant alluded to the entire piece as the said "Knapp House property," and he knew that complainant supposed and understood that he was purchasing the entire piece so enclosed. In one of the conveyances to complainant, the description, as dictated by defendant, specified two of the lots in said piece, as constituting the whole of the piece known as the Knapp property, and which defendant knew was untrue.

It further appeared that the entire piece enclosed was occupied by one Reede as tenant, and a mutual arrangement was entered into by all the parties that complainant was to have possession of the entire piece. The conveyance delivered to complainant omitted the said triangular piece.

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GOODENOW v. CURTIS.

Held, that according to the understanding of the parties, and, in fact, the agreement was for the purchase of the "Knapp House property." That complainant believed the deeds he received embraced it, and which the defendant knew they did not, and knew also that complainant was acting upon the faith that they did so, and was thereby deceived.

Held further, That complainant took possession under his purchase of the whole "Knapp House property," and so went into possession of the disputed parcel as a portion of such property.

Description of premises in bill of complaint. Where the description of property in the bill of complaint was such as to point out the premises by a name which was well known, and which distinguished it from others, held sufficient.

Amendment: Chancery Rule 21. Chancery Rule number twenty-one has no application to amendments at the hearing of a cause.

Heard April 17, 20, 21. Decided April 27.

Appeal in Chancery from Calhoun Circuit.

The bill was filed to compel the defendant to convey to complainant certain fractional lots in the village of Albion, included in an agreement of purchase, but omitted by the defendant in his conveyances; such omission being at the time unknown to the complainant, he supposing they were embraced in the conveyances.

The premises were described in the bill as the "Knapp House property," and known as such.

The defendant, in his answer, denies that said fractional lots were included in said agreement.

A decree was granted as prayed for in the bill.

The facts are stated in the opinion.

T. G. Pray, for complainant.

1. The testimony clearly shows that all the fractional lots were included in the agreement of purchase of the hotel property known as the "Knapp House property," of which they were a portion, and were mainly enclosed as such.

Where the agreement is positively denied by the answer, and is proved only by the unsupported evidence of one witness, that will not be allowed to prevail, but where the one witness is corroborated in his statement by circumstances, the proof may prevail over the denial.

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— *Fry on Spec. Per. p. 268, § 422; East India Co. v. Donald, 9 Ves. 276; Morphett v. Jones, 1 Sw. 172; Toole v. Medlicott, 1 Ball and B. 393.*

2. A court of equity will enforce the specific performance of a parol contract for the conveyance of land, where the purchase money, or a part thereof, has been paid, possession taken under the contract, and valuable improvements made.—*Burtch v. Hogge, Har. Ch. 31; Bomier v. Caldwell, Id. 65; Bomier v. Caldwell. 8 Mich. 463; Norris v. Showerman 2 Doug. 16.*

3. The testimony clearly shows that defendant knew complainant treated for the entire Knapp House property He must, therefore, be considered as having fraudulently withheld a conveyance of the parcel in question.

A vender who fraudulently induces the vendee to believe that he is purchasing a parcel of land of a certain extent, while the conveyance is so drawn as not to include the whole, will be decreed to convey the residue, — *Wiswell v. Hall, 3 Paige, 313.*

Chas. Draper and *Thos. Curtis,* for defendant in error.

1. The bill is for specific performance of a verbal agreement to sell and convey land. The answer denies a sale or agreement to sell and convey. And on this state of the case, it has been held that the complainant must fail, on the ground of the statute of frauds, which requires the contract to be written. To this point we cite — *Story Eq. Plead. § 762, note 1, and cases cited; Cozine v. Graham, 2 Paige, 177, 181; Ontario Bank v. Root & Cogdon, Id. 473; 11 Id. 498; Haines v. Knickerbocker, 5 Wend. 638.*

The agreement being denied by answer, complainant must show a written contract of sale, unless allegations of fraud are made, or payment and possession under it with improvements made, etc.

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2. The complainant, however, in order to take the case without the statute, averred in his bill that fraud was practiced on him by the defendant, Curtis, at the time the deeds were delivered; also that he took possession of the lots he claims, and the defendant gave him that possession, and that he was cheated and deceived by Curtis, in consequence of the confidence he reposed in his (Curtis') statements, as to what the deeds contained.

The complainant, to sustain his bill as to the frauds, must as clearly prove it. In this case we claim he has entirely failed.

The contradictory and confused statements of the complainant, as to the contract, and more especially as to the fraud alleged, by which he would avoid the statute of frauds, would seem to render it impossible to make any decree in the case. — *Fry on Spec. Per.* §§ *164–5–6–9, note 9; Id.* §§ *172, 203, 210, 211; Adams' Eq. 221.*

As to possession. — *1 Story Eq. Jur. 173,* § *157.*

Relief not granted when the evidence is loose, equivocal or contradictory, or when it is in its texture open to doubt, or apparent presumption. — *1 Story Eq. Jur.* § *158–9; Fry Spec. Per.* § *418; Jones v. Tyler, 6 Mich. 368.*

The evidence must be entirely satisfactory. — *1 Story Eq. J.* §§ *156, 180; Adams Eq. Jur. p. 351.*

"Sometimes, by mistake, the written instrument contains less than the parties intended; sometimes it contains more. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract. — *1 Story Eq. Jur.* § *152.*

This being a case not of mistake, but actual fraud, as claimed in the bill, the fraud must be clearly made out, by proofs entirely satisfactory, &c., and this rule applies to an omission as well as a mistake.

There must be a false statement in a matter in which

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one party places a known reliance on the other, and confidence in him.— *1 Story Eq. J.* §§ *197, 200.*

The party must be misled by the false representation — *Id.* § *202.*

If the purchaser, choosing to judge for himself, does not avail himself of the means of knowledge open to him, or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations.— *1 Story Eq. Jur.* § *200; Fry on Spec. Perf. 277, 283.*

3. As to the question of possession of the disputed property, it only becomes material in case the alleged contract is proved, and the fraud and misrepresentations of the defendant are clearly made out.

Complainant did not obtain it from the defendant Curtis. The delivery of the deeds, at most, only gave him possession of the land described in them — nothing more. As to the point, we cite — *Adam's Eq. 220, and notes.*

GRAVES, J.

The complainant filed his bill in the court below, to compel the defendant to convey to him certain premises in the village of Albion, and which he asserted to be a part of what was known as the "Knapp House property."

The Circuit Court decreed a conveyance as prayed by the bill, and the defendant appealed to this court. The testimony returned is very voluminous, and we deem it unnecessary to notice it in detail.

It appears that when the village of Albion was first platted, a parcel of land between Ionia and Superior streets, and running from the Kalamazoo River to an alley one rod in width along the south side of block thirty-three, was reserved by the proprietors, and set apart from sale for mill purposes; that afterwards, the northerly part, next to block thirty-three, was devoted to other uses,

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while the Michigan Central Railroad was so laid as to cut off a corner of lot two in block thirty-three, and a large portion of the parcel which had been so reserved. This left the triangular piece marked seven, eight, and nine, as on the second plat given in the record.

It also appears that from about 1858, when Gilbert Knapp purchased the triangular piece of one Chatfield, to the time of the bargain between complainant and defendant, in September, 1865, the lots one, two, three, and four on block thirty-three, and the parcel in question were held and occupied together as one possession and establishment; that the lots three and four, and the piece in dispute, together with the alley between, were fenced as one enclosure, and used and enjoyed with the lots one and two; and that the territorial form and extent of the "Knapp House property," was marked and indicated as here stated by undivided ownership, by fence, and visible occupation and use at the time complainant bargained for it with the defendant. In addition to this, it is very clearly proved that for several years next preceding the time of complainant's negotiation and purchase, these premises as thus held, occupied and used, had been well known as the "Knapp House property;" that they were so known when the defendant purchased the premises of Knapp, when he leased to Reed, and when he bargained with complainant.

Under these circumstances, the complainant, who was a stranger in the place, proceeded to bargain with the defendant for the premises as the "Knapp House property," and the defendant not only spoke of the premises under that name in conversation with the complainant, uniformly if not universally, but, in person and by Reed whom he made his agent therefor, carefully pointed out as belonging to the premises they were in treaty about, and then denominated the "Knapp House property," the identical triangular piece in question.

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The complainant bargained for what was known as the "Knapp House property," and for the whole of it, and, in doing so, naturally and reasonably contemplated the facts which applied the name to the subject matter; and the evidence is strong to show that up to the delivery of the deeds, the complainant believed that in purchasing he was buying the property bearing that name, as it had been held and occupied for several years, and had been shown to him by defendant and Reed; and the proofs also show that the defendant knew the complainant was acting under such impression and belief when the deeds were so drawn by the defendant's direction as to omit altogether that part of the property mentioned as the triangular piece. In this it seems to us the defendant was active in passing upon complainant as conveyances of all the land embraced by the bargain, two instruments of conveyance which he knew omitted a portion; and this opinion is much supported by the circumstance that the description in one of the deeds, as dictated by defendant, specified lots one and two, as the "Knapp House property." This description furnished by the defendant imported that lots one and two constituted what was known as the property, and the whole of the property, bearing the name last mentioned. It was a representation by the defendant to complainant in the deed itself, which the defendant, according to the evidence before us, must have known to be untrue.

Another fact drawn from the record has some bearing upon this branch of the case. At the time of the bargain with complainant, Reed was occupying the whole premises under a lease from defendant, and though it was understood that complainant wanted possession of all he should purchase, no one supposed that he wanted possession of more. The parties, however, proceeded to make an arrangement with Reed to give up possession of the whole, and he agreed to do so. And, on this negotiation, neither party suggested that the necessity for giving up the triangular piece to

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complainant was less or otherwise than that for giving up the other lots. On the contrary, the necessity for securing the possession of that portion as a means of completing the bargain between the parties, was, by this conduct, as strongly evinced as the necessity for the possession of the other lots.

We are, therefore, satisfied that the defendant agreed to sell, and the complainant to buy, the "Knapp House property;" that such property in fact, and according to the understanding of the parties, included the portion in question; that the complainant believed the deeds he received embraced it, while the defendant knew that they did not, and knew also that the complainant was acting upon the faith that they did so, and was therein deceived. We are also satisfied that the complainant took possession under his purchase of the whole "Knapp House property," and and so went into possession of the disputed parcel as a portion of such property.

We observed on the argument that the defendant much relied on what he deemed uncertainty, and contradiction in the description of the property, and on inspection of the record, we find abundant evidence that this idea gave a coloring to the defendant's answer and testimony. But the view of the defendant on this point cannot be supported.

The description as contained in the bill, before the amendment, was reasonably certain.

It pointed out the property by a name which seems to have been well known, and which distinguished the premises from other property.

It was also claimed that the amendment of the bill at the hearing was forbidden by rule twenty-one of the Circuit Court in Chancery, and if not, that the amendment was too fundamental to be reconciled with the course of the court.

Neither of these positions can be maintained. The rule referred to has no application to amendments at the hearing, and the change in the bill in no manner affected

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the issue, or altered the rights of the parties. While it was not needed to supply any real deficiency in the bill, it could have no other effect than to furnish a second, and somewhat more elaborate, description of the same property.

We think the decree below should be affirmed, with costs.*

The other Justices concurred.

Oliver C. Abell v. Lewis R. Munson.

Practice in Circuit Court: Meaning of representations: Jury. Where there was parol evidence given that a party on transferring a note, represented the note to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not to be presented at once, and the evidence of solvency was conflicting, it was properly left to the jury to determine the meaning and extent of these representations, to ascertain whether they were true or not.

Statute of frauds: Land Contract: Parol evidence: Time of performance. Under the statute of frauds, which requires all contracts for the sale of lands to be in writing, and makes them void if not written and signed by the vendor, parol evidence cannot be received to show a subsequent verbal agreement to change any of the terms, as no part of the contract can rest in parol.

And where a contract fixes expressly the time of performance, it binds the parties, and no inquiry can be made as to what would have been a reasonable time for such performance.

Measure of damages: Value of real estate: Evidence. In estimating the value of land at a given time, testimony of its value a few months after, is admissible to go to the jury, as furnishing some means of guidance. It will not be assumed, without proof, that any great change must have occurred in such an interval.

Heard April 21, 22. Decided April 27.

Error to Wayne Circuit.

This was an action to recover damages for not conveying certain real estate according to the terms of a certain contract.

On the trial, the plaintiff gave evidence tending to

* Fry on Specific Performance, 2 Am. Ed. 156, 157, top paging; Hurley v. Brown, 98 Mass. 545, and cases cited.

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how that about the tenth of June, 1867, he made a verbal agreement with the defendant for the purchase of lot 16 (hereafter mentioned in written contract), and gave a note against Philetus Howe for $129.25, in full payment for the same; that nothing was said at the time of giving the note to defendant about the pecuniary responsibility of Howe, or about the note being as good as the cash; that before June 10th, he had offered said note against said Howe for said lot, and defendant did not take the note at that time from him, but said he would see about it; that about June 10th, he met defendant again, and defendant said he would take the note for the lot; defendant took the note and agreed to make the contract; that the written contract was to be made by defendant, and handed to him, witness; that said contract was delivered to witness three or four months after its date; and that on June 10th, at the time of stating agreement, it was agreed that the written contract, when drawn, was to be dated back to the time of giving of note by witness to defendant: such was the understanding at the time note was given to defendant. Said contract was as follows:

"Articles of agreement made this 10th day of June, 1867, between Oliver C. Abell, of Wayne County, Michigan, and Lewis Munson, of the town of Nankin, Wayne county, Michigan. The said first party, in consideration of the sum of $129\frac{25}{100}$ to him paid, hereby agrees to sell unto the said second party, all that certain piece or parcel of land situated and being in the county of Wayne, State of Michigan, and described as follows: Lot No. sixteen (16) in the village of Wayne, in O. C. Abell's addition to said village, and according to the plat thereof, be the contents of said lot more or less, which the said second party has paid the first party for said lot, one hundred and twenty-nine $\frac{25}{100}$ dollars; said payment being a note against Philetus Howe. Said second party also agrees to pay all

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taxes and assessments that shall be taxed or assessed on said premises from the date hereof, until said sum shall be fully paid as aforesaid; and the said party of the first part, on receiving such payment at the time, and in the manner above mentioned, shall, at his own proper cost and expense, execute and deliver to said second party, or to his assigns, a good and sufficient warrantee deed, as soon as said first party gets said plat surveyed and recorded.

It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on the first day of September, 1867, and he shall keep the same in as good condition as they are in at the date hereof, until the said sum shall be paid as aforesaid; and if the said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have the right to declare the same void, and retain whatever may have been paid upon such contract and improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant, holding over without permission, and may take immediate possession of the premises and remove the party of the second part therefrom; and it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Signed, O. C. ABELL."

That about ten months after date of contract, and six or seven months after its delivery, witness called upon defendant and demanded a deed; that defendant said he wanted to talk with him, and made no other reply; that a few days afterwards he called again, and defendant made same reply; that a few days after that, he called

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the third time, and defendant said he had seen Howe, and that Howe said that he himself was not responsible, and was insolvent at the time he, defendant, took note of plaintiff, and was then irresponsible and insolvent, and that the representations which defendant claimed witness made to him were untrue, and that he, defendant, would not give a deed; that witness said to defendant that Howe would not swear to his irresponsibility. Plaintiff also gave testimony tending to show Howe's responsibility; also, that when defendant first spoke about selling the lot, he had a draft of it on paper, and said it was four by eight rods; and when he first spoke to defendant about buying the lot, in June, 1867, defendant said he should have it platted and recorded within three months. Witness having shown himself familiar with the value of land property in Wayne, was asked by counsel for plaintiff what the market value of said lot sixteen was at the time he testified that he demanded the deed, to which question counsel for defendant objected as irrelevant; but said objection was overruled, and counsel for defendant excepted. Witness stated it was worth one hunhundred and fifty dollars, ($150.)

The plaintiff further testified that said lot was to be platted and surveyed four rods by eight rods, and the value was estimated by the witnesses on that basis.

Counsel for plaintiff then rested his case.

The defendant, being sworn, gave evidence tending to show that at the time of receiving the note from plaintiff the plaintiff represented to him that it was good as the cash, and that the maker was perfectly responsible.

That said note was due on demand, but that said plaintiff requested the witness not to call on Howe for payment for three or four months; that at the expiration of three or four months, defendant called upon Howe for payment, and within a week or two afterwards the plaintiff called on witness for a deed; that defendant informed

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plaintiff that he had seen Howe, and that Howe said he was not good for anything when defendant took the note, and plaintiff knew it; that defendant went to plaintiff three or four days before commencement of the suit, and tendered plaintiff the note for the first time, saying to him that it was not worth the paper written on; that plaintiff declined to receive the note, and said to witness that he could not rescind. The defendant then testified that he did not tell plaintiff he would survey and plat said lot in three or four months, or within any time, and further testified as to the efforts made to get said premises, including lot sixteen, surveyed and platted.

Philetus Howe was then sworn, and gave evidence tending to show his solvency.

The charges of the court are stated in the opinion.

Judgment was rendered in favor of plaintiff.

Moore & Griffin, and *H. Balus*, for plaintiff in error.

H. M. & W. E. Cheever, and *Vining & Minnock*, for defendant in error.

CAMPBELL, J.

Munson sued Abell for not conveying certain property, according to agreement. The defence was that the agreement was obtained by fraud, and without consideration; and also that there had been no default, or none which had not been waived by subsequent agreement.

The consideration paid in advance was a note against one Philetus Howe. Abell claimed and testified that Munson represented this note to be "as good as the cash, and that the maker was perfectly responsible." He testified further, that Munson desired him not to call upon Howe for three or four months. He further testified to calling on Howe, and being informed by him of his insolvency, and to several interviews with Munson in

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regard to the matter, and to a joint interview of both with Howe. Howe's testimony showed that he was not insolvent.

It is unnecessary to refer at length to the facts on this part of the case, as the charges show sufficiently upon what footing the court left it.

The judge charged that no recovery could be had, if the note was taken on Munson's representations, and if those representations were untrue, whether he knew their untruth or not. He told the jury that it was for them to determine what was meant by the representations sworn to, and that Abell had a right to rescind within a reasonable time for fraud, if existing, and that he would not be prejudiced by any delay in rescinding caused by the fault of Munson. What was reasonable time, he left to the jury under the circumstances, there being directly contradictory testimony upon all these points.

The rulings of the court in these matters were quite as liberal as Abell could ask. They were some of them based on assumptions which contradicted the written agreement, and which were not admissible. We think there was no error in this part of the case against the rights of Abell.

We think, also, that all the difficulties urged concerning the contract itself, and its breach, arise from the court below allowing a more liberal treatment to plaintiff in error than he was legally entitled to. When the contract is viewed in its true legal aspect, the objections all become incompetent.

The agreement is in writing, dated June 10, 1867, reciting the receipt of the Howe note as an absolute payment for the land contracted, and agreeing to convey "lot numbered sixteen in the village of Wayne, in O. C. Abell's addition to said village, and according to the plat thereof," and to execute a good and sufficient warranty deed, "*as*

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soon as said party of the first part gets said plat surveyed and recorded." The contract further stipulated that Munson should have possession on the first day of September, 1867.

There was testimony tending to show that while the contract was agreed upon at its date, and the consideration then paid, yet in fact it was delivered some three months after its date, but dated back by agreement. And the defense consisted in the claim that there was no liability until a survey and plat had been actually made; and also that Abell had used diligence to procure a survey, and that Munson had so acted as to extend the time of performance at various periods.

The statute of frauds requires every contract for the sale of lands to be in writing, and signed by the party making the sale.—*2 Comp. L. § 3179.* The rule prohibits any enforcement of parol contracts; and while written contracts, which would have been lawful if unwritten, may be modified by parol subsequently in many cases, yet this cannot be done where the law requires the agreement to be in writing.—*Goss v. Lord Nugent, 5 B. & Ad. 58; Stowell v. Robinson, 3 Bing. N. C. 928; Stead & Dawber, 10 A. & Ell. 57; Marshall v. Lynn, 6 M. & W. 109; Blood & Goodrich, 9 Wend. R. 68.* And our statute goes further than the English statute, by making the contract void, instead of declaring that no action shall lie upon it.

We cannot look outside of the written contract to ascertain anything which is fixed by it. And if the time of performance is absolutely fixed by agreement, there is no room lett for the inquiries concerning reasonable time which the court allowed to be made, and for its rulings concerning which most of the errors are assigned.

The agreement that Munson should take possession on the first of September, necessarily implies that the plat shall have been made previously, for otherwise there could be no identification. As the land had been already paid

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for, any long delay would have been unreasonable, and we must regard this date as the one fixed by the parties themselves. And if the contract was actually delivered afterwards, inasmuch as the vendor chose to execute a document which contained such a provision, he was bound to convey at once. There was no condition to be performed on the other side, for the land was fully paid for, and under such circumstances he was the only party bound to perform. The whole inquiry concerning reasonable time was irrelevant, and the rulings were more favorable to Abell than he had any right to request.

The plaintiff below, Munson, testified to a demand made in the spring of 1868, and that the property was then worth about $150; and other witnesses testified to its value at that time. It is objected that this testimony was irrelevant. We do not think this objection valid. Assuming the first failure to have been on the first day of September, or when the contract was delivered, if after that time, we cannot regard such evidence of value at a time so little distant, as not admissible to show what was the value of the land previously. The law has no presumptions on the subject of changeable values in real estate, and such proof, though liable to be overcome by evidence of a previous change in the interval, is not too remote. These things must be looked at in a common-sense light, and as they would be regarded by ordinary men interested in such transactions. While land does undoubtedly change values, yet it does not usually, unless in some peculiar localities, fluctuate so rapidly as to render evidence extending over a few months entirely useless as a criterion.

If the court had declared this evidence conclusive, and had shut out evidence of value at other periods, it might have become necessary to consider whether, after the time for performance has elapsed on a land contract, the New York rule, requiring a demand before action, should be recognized, or would apply where no tender is needed, as in a case

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like the present, where the consideration had all been paid in advance. See *Connelly v. Pierce, 7 Wend. 129; Blood v. Goodrich, 9 Id. 68.* As the case stands, we do not feel called upon to consider the force or necessity of a demand, as fixing the date of liability for non-performance.

The case is a very clear one, and the only error that we can discover is that the plaintiff below conceded, and the court adopted, a series of admissions of legal privileges, to which defendant below was not entitled. These are not errors of which he can complain in this court.

The judgment must be affirmed, with costs.

The other Justices concurred.

John Patten v. The People.

Homicide: Riotous Assembly: Duty of prosecution in offering proof: Declarations: Right of defence: Cross-examination. On a trial for a homicide where it appeared that the riotous assembly, (of which the deceased was one) gathered at the time, grew out of and was connected with one which had assembled there the night before, and with the same object—it was held that all the proceedings and objects of both gatherings, together with the provocation to the defendant and his acts, constituted together one entire transaction.

Held, further, that as the homicide resulted directly from said assemblages, and their riotous conduct, it was the right and duty of the prosecution to show the transaction as a whole, its nature, and its objects, whether tending to show the guilt or innocence of the defendant.—*Maher v. People, 10 Mich. 212; Brown v. People, 17 Mich. 439.*

Held, further, that whether the prosecution failed to do so or not, it was the right of the defendant, either by cross-examination or by his own witnesses, to go fully into all matters thus constituting the *res gestæ*, and to show any act or declaration of any one of either assemblage, in furtherance of the common object, or in reference to it, from its inception to its close—the combination once being shown.

Cross-examination: Res Gestæ. A witness for the prosecution (one of the rioters,) having testified fully in reference to the proceedings of the first night, and that defendant had confessed to having struck deceased on the second night, denied on cross-examination, that he had stated to different persons soon after, that he was present as a horner, but was only a mere looker on, and took no part in the matter whatever.

The court refused to permit the defendant to contradict said testimony.

Held, that said statements related to the *res gestæ*, and their contradiction was competent.

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PATTEN v. THE PEOPLE.

Justifiable Homicide. There is no positive rule for the definition of justifiable homicide. It must depend upon the circumstances and surroundings of each case.—*Pond v. People, 8 Mich. 150.*

Justifiable Homicide: Defense of one's family. If from the defendant's knowledge of his mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent as though the danger to her life had resulted from an actual attack upon her person, or as though in the like danger from an attack upon himself; and he was justifiable in using the same means of protection in the one case as the other.

Held, further, that if the noise and tumult of the rioters prevented defendant giving them notice of the danger to his mother, he was excused from doing so.

Homicide. Rights of defendant. The defendant was justifiable in acting for his defense according to the circumstances as they appeared to him; and if from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself, or any member of his family, and he had tried all reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection, and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable.

Criminal Cases: Mode of review: Writ of Error. In criminal cases where the proceedings before judgment are sought to be reviewed by the Supreme Court, they are to be certified to this Court by the clerk without the agency of a writ of error, and no assignment of errors is necessary.

Heard 7th and 8th. Decided April 27th.

Error to Oakland Circuit.

The defendant was tried and convicted for the homicide of one Elias Cowles.

Upon the trial the people offered proof, tending to show that a few days prior to the 17th day of December, 1867, the defendant, John Patten, who was then residing in Highland, in said county, got married to a Miss Sarah Grow; that on the night of the 17th, Luther Mills, George Mills, James Lockwood and others, to the number of from eight to fifteen, got together and went to said respondent's to "horn" him. That they went there in the night time, between nine and ten o'clock; that one of the party had a gun; others tin horns, cow-bells, &c.; that they went in upon the premises of said Patten, who was then living upon a farm with his father and mother; and commenced their "horning" by shooting the guns, blowing the horns, ringing bells and yelling, and soon after defend-

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ant came out and ordered them off, and they all ran off. It further appeared that defendant heard that the horners purposed to visit his house the next night.

The people further offered proof tending to show that Elias Cowles, the deceased, on the following day, made preparations to go the next night to "horn" the prisoner; that he met with some fifteen or twenty others, and on the night of the 18th, was elected captain; that they had guns, tin pans, horns, a horse-fiddle and other instruments to make noises with; that they had seven or eight guns, army muskets, so-called, and shot guns; that one of the party had a shot gun loaded with powder and shot, which had been loaded a few days before to shoot rabbits with and that the boy who had this gun fired it off in the air after they got to Patten's; that they went into the yard of the premises of the defendant, and there fired their guns into the air, and blew their horns, rang their bells, and made as much noise as they could upon these instruments; that they passed from the road into the yard through a large gate; that they walked along still, without making any noise, until the word was given, and then all the guns were to be fired at once, and then the other noises to commence; that Elias Cowles requested William Lee, one of the party, and a witness, to give the word as they, the Pattens, would not be so likely to know his voice; that he, William Lee, did give the word, and all the guns were fired; that the said Cowles had a gun; that he (Lee,) had a joint of a flute, and blowed on it; that there was considerable yelling; that after the noise had been going on a few minutes, John Patten came to the door, near where they were, but said nothing; he went back into the house, and soon came out and went towards Elias Cowles, who was standing facing him, with the butt of his gun on the ground; that John Patten ran up to him; that said Lee heard a blow; that he looked and

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saw Elias Cowles partly down on his hands and knees; that Patten struck a second blow; that he then saw he had an axe, and this blow struck Cowles on the head and knocked him clear down; that the witness hallooed "for God's sake don't let him kill this man,'" and stepped towards the prisoner, and he ran back into the house; that Cowles got up, picked up his hat and his gun—some one asked him if he was hurt, and he said he guessed not much, but he must go and get a drink of water; that he died next day from wounds received that night.

The prosecution asked Lee under objection:

"Did you go to Patten's for any other purpose than to 'horn' Patten?"

The Court overruled the objection and admitted the evidence, and defendant excepted.

The counsel for the defendant asked the peoples' witness, on his cross-examination, if Cowles did not tell him, that the boys running away the night before was a cowardly act, and that night they were going to get a company together and go there and stand their ground.

The prosecution objected, and the Court sustained the objection.

On the part of the defendant, it appeared that he resided with his father and mother who were aged and infirm people; that the old lady was quite feeble, and had for many years suffered from palpitation of the heart, and also from spells of dizziness; that any unusual excitement brought on the palpitation of the heart, and any over doing or prostration was likely to be followed by attacks of dizziness.

That defendant on being aroused by the noise out of doors, went down stairs; that his mother was in great terror, lest violence should be done.

That she begged him to drive them off; that he then stepped to the door and ordered them off; they paid no

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attention to it; the noise kept on; he stepped to the door again, and took the axe and stepped out, and several voices cried, "shoot him; damn him, shoot him;" that as he stepped out owards them, the crowd sallied on to him, and he was struck with a gun or other weapon; that he struck deceased, and then went into the house, and that several gun wads were fired through the open door.

The counsel for the prisoner submitted several requests in writing, and asked the said Court to charge thereon, among which were the following:

First—"That private persons may forcibly interfere to suppress a riot or resist rioters; and although a riotous attack be not a felonious one, yet if the riot be directed against the property or the house of the person who resists it, in making such resistance, he has a right to the use of such means as will make the resistance effectual; and if in making such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

The Court refused, but did instruct the jury, "that if the rioters were there upon the premises of the prisoner, and did no injury to the property, and did nothing but make their noises, it would be but a mere trespass, and the owner could not eject them or expel them by force, to the extent of taking life, unless to prevent some felony about to be committed or attempted, by the rioters, or to save life or limb."

The following requests to charge were all refused and excepted to.

Second—"That persons have a right to the peaceable possession of their premises and property, and if, while in the peaceable possession of such property, a riotous assemblage takes possession of such property in the night time, and undertake to maintain such possession by force, the owner may repel such riotous assemblage by force, and if in mak-

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ing such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

Third—"That the law of self-defence is a law of nature. It extends not only to the person himself, but to those who bear the relation to him of parent and wife, and it also extends to his house, called in the law his "castle," and a person may make effectual this defence from all attack; and if in making this defence, it becomes necessary to take the life of the aggressor, it will not be felonious, but will be excusable homicide."

Fourth—"That, if from all the evidence and circumstances proved, the jury find that the prisoner had reasonable grounds to believe that there was, before he struck the blow, a design to commit any felony upon his house or upon any members of his family, and that the deceased was either principal in such design or present as accessory, the killing of the deceased will be excusable homicide, although it afterwards appear that no felony was intended."

The Court refused, except with the following qualification and amendment, to wit: after the words "members of his family" insert these words, "and the danger imminent," and at the end of said request, add the words "provided he first used all other means in his power to prevent the accomplishment of the supposed intended felony."

Fifth—"That the prisoner had a right to judge, and upon the facts and circumstances which surrounded him, as they appeared to him at the time of the homicide; and, if from all the evidence the jury find, that the homicide was committed in repelling an unlawful and malicious assault upon his dwelling house, and he used only reasonable and necessary means to prevent it, the act of the killing will be excusable homicide."

The court refused, except with the following qualification and amendment, to-wit: after the words, "appeared to him at the time of the homicide," insert the following

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words: "but at his own peril—and it is the province of the jury to determine, from all the facts and circumstances, whether the accused had reasonable cause to apprehend imminent danger to life or limb, or that a felony was about to be committed."

Sixth—"That if the jury shall find that the prisoner was laboring under a reasonable apprehension that his mother was so affected, by the riotous assemblage, that she was likely to die, or to receive grievous bodily harm, and he could not remove the rioters from his premises without force, and by resort to force, the deceased was killed, the killing will be excusable homicide, provided no more force was used than was necessary, under the circumstances, as they appeared to the prisoner at the time, in repelling the riotous assemblage."

After the judge had concluded his general charge to the jury, he further charged that a riot was not a felony, but only a misdemeanor.

The defendant was convicted of manslaughter.

M. E. Crofoot, for plaintiff in error.

1. Only the acts of the rioters, could be given in evidence on behalf of the people. Their undisclosed intents and purposes were immaterial.

2. Affirmative evidence having been offered by the people, and admitted by the court, to show the purposes and the intent with which the rioters went to Patten's, viz: for no other purpose than to horn him, it was certainly competent for the respondent to meet that evidence by showing that they went for other and different purposes, namely: that they went there with an intent to remain, and conduct their riot with force and violence, and to engage in actual conflict, if need be, in order to remain.

Under the same point we claim that the court erred, in not permitting the counsel for the respondent to show, on the cross-examination of Delos Alger, a witness called

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by the people, all of the conversation that was had between the witness and Cowles, at the time Cowles spoke to him about going; the witness, on his direct examination, having been examined on that point.

3. The defendant was justifiable in defending himself from the attack of the rioters even to the taking of life.

While it is not denied but that the instructions prayed for, should have been given in case of committing or attempting *felonies* with force, yet as it was claimed as applicable to all misdemeanors, or attempted misdemeanors, it would be improper; it is important to consider:

a. What crimes were denominated felonies at the common law?

b. Why, in felonies, a different rule should be adopted from that of misdemeanors attempted or committed with violence and force, creating a breach of the peace, and therefore tending to the most serious consequences.

The general term *felony*, "comprises every species of crime, which occasioned at common law forfeiture of lands and goods;" but so general had become the impression that the life of the *felon* became forfeit, that all *capital offenses* obtained the general signification of felonies.—*1 Bl. Com. 94 to 98; 1 Russ. on Crimes, 5th Am. Ed. 14, 15; 1 Bish. Cr. Law, §§ 448, 449.*

Crimes and misdemeanors, are "synonymous terms—though in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye." —*4 Bl. Com. 5.*

"A misdemeanor is any crime less than a felony."—*1 Bish. Cr. Law, 453; 1 Russ. on Cr. 45.*

If one sees a felony being committed, and he does nothing to prevent it, he is himself guilty of crime—*misprision of felony;* that, therefore, in discharging this duty, if he necessarily kill, he is within the principle of *perfect defense.—2 Bish. Cr. L. § 551.*

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Mr. Bishop even refers the law of *self-defense* in justifying homicide from a murderous attack, to this principle, rather than the preservation of the life of the assailed party.—*Id.* § *549*, last paragraph.

When there is *a duty to resist the aggressor*, then this right of perfect defense exists.

And although this author seeks to make this duty the controlling point in the right of perfect defense, yet he recognizes the correctness of the authorities which put this right upon the ground of resisting crimes committed with *force;* which *force* creates the necessity; from which it follows that the duty alone does not create the right, but rather the *necessity.*

And this question has been directly adjudicated.—*Gray v. Combs, 7 J. J. Marshall, 478;* Cited *in* § *555, 2d Bish. Cr. L.*

And Blackstone refers this right of defense rather to the prevention of forcible crimes, and also by night, than to the extent of the punishment.—*4 Bl. Com. 180.*

And he also refers the law of self-defense to the right to defend from *forcible attack.—3 Bl. Com. 3 and 4.*

Riots, by the authorities, are classed among the most *dangerous* of crimes; and for their prevention and suppression, the most powerful and urgent means are demanded; and the right of private persons to resist and suppress them by means not allowed as to other misdemeanors, we find stated in the oldest common law authorities.—*1 Hawk. P. C. Ch. 28,* § *14; Id. Ch. 65,* § *21; Text in 1 Arch. Cr. Pr. and Pl. p. 789* [*223*]*; 1 Hale P. C. 53, 494, 495; Fost. 272; Poph. 121, cited Id. p. 788, note; 1 Russ. Cr. 285; Mead's Case, 1 Lew. c. c. 184; Id. 1 Russ. 663.*

And it is as well the *duty,* as the right of all persons—officers and private persons—to suppress riots and prevent affrays. The preservation of the peace is *a duty*

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charged upon all who see it broken.—*1 Bish. Crim. Proceed.* § *623, 626, 628; 2 Bish. Cr. Law,* § *573.*

And so important has it ever been considered to prevent and suppress these crimes, that statutes highly penal, and containing especially efficient provisions, have at most all times been enacted.—*4 Bl. Com. 142 to 147.*

This court in the case of *The People v. Pond,* established the rule that a homicide may be justifiable in repelling a riotous attack, although the riot itself be not *necessarily felonious.—8 Mich. 150–1, 173, 178.*

Under the law, then, as laid down by these authorities, we claim that the respondent had the right to the instructions prayed.

First. "Private persons may forcibly interfere to suppress a riot or resist rioters; and although a riotous attack be not a felonious one, yet if the riot be directed against the property or the house of the person who resists it, in making such resistance he has a right to the use of such means as will make the resistance effectual; and if, in making such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

Second. "That persons have a right to the peaceable possession of their premises and property, and if, while in the peaceable possession of such property, a riotous assemblage takes possession of such property in the night time, and undertakes to maintain such possession by force, the owner may repel such riotous assemblage by force, and if, in making such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

Third. "The law of self-defense is a law of nature. It extends not only to the person himself, but to those who bear the relation to him of parent and wife, and it also extends to his house, called in the law his "castle," and a person may make effectual this defense from all attacks,

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[*of a felonious nature;*] and if in making this defense it becomes necessary to take the life of the aggressor, it will not be felonious, but will be excusable homicide."—*2 Bish. Cr. L.* § *569.*

Fourth. "That if, from all the evidence and circumstances proved, the jury find that the prisoner had reasonable grounds to believe that there was, before he struck the blow, a design to commit any felony upon his house or upon any members of his family, and that the deceased was either principal in such design or present as accessory, the killing of the deceased will be excusable homicide, although it afterward appear that no felony was intended.

Fifth. "That the prisoner had a right to judge, and act upon the facts and circumstances which surrounded him, as they appeared to him at the time of the homicide; and if, from all the evidence, the jury find that the homicide was committed in repelling an unlawful and malicious assault upon his dwelling house, and he used only reasonable and necessary means to prevent it, the act of the killing will be excusable homicide."

Sixth. "That if the jury shall find that the prisoner was laboring under a reasonable apprehension that his mother was so affected by the riotous assemblage, that she was likely to die, or to receive grievous bodily harm, and he could not remove the rioters from his premises without force, and by resort to force, the deceased was killed, the killing will be excusable homicide, provided no more force was used than was necessary, under the circumstances, as they appeared to the prisoner at the time, in repelling the riotous assemblage."

The apprehended danger to life, spoken of in the books need, and does, not necessarily contemplate immediate death;

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but an injury that would shorten life is within the rule.—*2 Bish. Cr. L.* §*562.*

And the bodily harm apprehended is not necessarily such as endangers life.—*Young v. State, 11 Hump. 200; 2 Bish. Cr. Law,* §*561.*

The charge then, taken together, and the requests asked by the prosecutor and singly given, and the requests refused, had an evident tendency to mislead the jury as to the law of the case: and if the respondent, under all the circumstances of the case, had a right to use force to suppress the riot—to repel the assault—to resist the apprehended attack—to protect his household and defend his dwelling—whether the degree of force used was either excusable or justifiable—was a question for the jury to pass upon, under proper instructions from the court as to the law of the case.—*State* v. *Clement, 32 Me. 279; Sefridge's trial, cited in Wharton on Homicide, 456, 457; Maher v. People, 10 Mich. 212, 221 to 224.*

Dwight May, Attorney General, for the People.

1. The court below erred in permitting the witness, William Lee, to answer the question as to whether they (the horners) went to Patten's for any other purpose than to horn Patten.

a. Lee being of the party who went to Patten's, it was competent to show by him with what intent he was there, and if he knew, with what intent the others were there.

Where a person does an act, he may, being a witness, testify to the motive or intent with which it is done—*Wheeldon v. Wilson, 44 Maine, 1; Seymour v. Wilson, 14 N. Y. 567; Foster v. Walker, 25 Id. 430, 9; McKoon v. Hunter 30 Id. 625; Bedell v. Chase, 34 Id. 388.*

b. If the defendant could show the intent with which the "horners" went to Patten's, why may not the people?

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c. The testimony being admissible, its weight or effect was a question for the jury.—*Hilliard on New Trials, 247, and cases cited.*

What occurred the night before the homicide was a distinct transaction, and not necessarily connected with it. If the "horners" were guilty of a crime the second night, the fact that some or all of them had been to Patten's before, and on a similar mission, would not add to or diminish the offense. It was not a continuous offense.—*Whart. Crim. Law, 446; Whart. on Hom. 182; State v. McCants, 1 Spear, (S. C.) 384; Com. v. Green, 1 Ashmead, 289.*

Nor would this proof show a felonious intent on the part of Cowles, and those with him. It would show the reverse, for it is quite clear from the whole record that they went to Patten's to "horn" him, and for no other purpose.

2. The court refused to charge that private persons may forcibly interfere to suppress a riot or resist rioters, &c.

a. Chapter 184, *Comp. Laws* does not authorize private persons to suppress a riot.

b. A riot is only a misdemeanor.—*Chap. 184, Comp. Laws.*

c. And it is not a felony at Common Law.—*2 Bish. Crim. Law, 963.*

d. A private person may act only to prevent the commission of treason or of a felony.—*1 Bishop Crim. Pro. 622, 623.*

The charge on this point as given, was correct.—*Wharton on Homicide, 212, 213; People v. Doe, 1 Mich. 456; People v. Horton, 4 Id. 67; Pond v. The People, 8 Id. 150.*

3. It is not excusable homicide, when life is taken in defending one's premises against an attack, not of a felonious nature.

4. A person is not permitted to measure his own wrongs, and to judge of the necessity of taking life. It would

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permit killing for the slightest trespass.—*Pond v. The People, 8 Mich. 164, 175, 177; Shorter v. The People, 2 Comst. 193; U. S. v. Wiltburger, 3 Wash. 515; People v. Lamb, 2 Keyes, 360.*

5. Before the taking of life will be excusable or justifiable, the accused must use all other means in his power to prevent the accomplishment of the supposed intended felony.—*Pond v. The People, 8 Mich. 150; Shorter v. The People, 2 Comst. 193; Stewart v. State, 1 Ohio, St. 66; 11 Allen, 205, 206.*

CHRISTIANCY J.

The evidence on the part of the prosecution, as well as that on the defense, showed very clearly that the riotous assembly, which gathered about the house of the defendant, on the night of the homicide, grew out of, and was directly connected with, that which had assembled there the night before, and had the same object in view; that Cowles, the deceased, on the day intervening, went around to several boys and young men, to induce them to go the next (second) night; that he was active in getting up this second riotous assemblage, and was elected their captain. All the proceedings and objects therefore of both assemblages, the provocation thereby to the defendant, and his action in opposition to them, constituted together one entire transaction, or the *res gestæ*. And as it was also clear that the homicide, whatever its legal character, resulted from these assemblages, and their riotous conduct, and would not otherwise have occurred, it was not only the right, but the duty of the prosecution to show generally the transaction as a whole, its nature and its objects, whether its tendency should be to show the guilt or innocence of the defendant.—*Maher v. The People, 10 Mich. 429, and Brown v. The People, 17 Mich. 212.* This was not only necessary in fairness to the prisoner, but to enable the jury, from a view of the whole,

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to estimate and apply each particular item of evidence which might be adduced in any stage of the case.

But whether the prosecution did this or not, it was the clear right of the defendant, either by cross-examination, or by witnesses introduced in his defense, to go fully into all matters thus constituting the *res gestæ*. He could not be bound by the showing on the part of the prosecution, but was at liberty to show that the transaction as a whole, or in any of its parts or purposes, was different from that shown by the prosecution. And for this purpose it was competent for him to show any act or declaration of any individual of either assemblage in furtherance of the common object, or in reference to it, from the inception to the close of the transaction; their combination or concert having already sufficiently been shown.

The defendant undertook to do this by the cross-examination of the prosecutor's witnesses, and the proposed cross-examination was strictly legitimate under any rule ever applied to cross-examination, as it related directly to matters called out on the direct examination. The prosecutor's witnesses, some of the rioters themselves, had already given evidence, tending to show that the only object of the rioters was to go upon the defendant's premises for the purpose, as they expressed it, of "horning the defendant," who had lately been married, and that they contemplated no violence or injury to person or property. The defendant offered to show, on cross-examination, that at the time the rioters made the arrangement to assemble the second night on the defendant's premises, their running away the night before was talked of by them, and was called a cowardly act; that they were going to get a company together that (second) night, who were not afraid, and would stand fire, and stay on the premises, and horn the defendant, whether he liked it or not; and that they would not go off the premises or be driven off.

This cross-examination the court erroneously refused to

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permit; and the error would not have been less, had the defendant offered to show the same facts by witnesses of his own.

The court equally erred in refusing the defendant the right to show that Cowles, the deceased, had said substantially the same thing to one of the witnesses on the part of the prosecution.

Henry Butler, who was one of the rioters on the first night (though not upon the second), and who had testified fully on the part of the people in reference to the proceedings of that night, and had also testified that defendant had confessed having struck the deceased three times on the last night, was asked on cross-examination whether he did not, at the house of Mrs. Barret, a few nights after, state to her, that he was not there the first night as one of the company of the horners, but that he happened there as a mere looker on, and took no part or lot in it whatever; to which he answered in the negative. Similar questions were asked him as to similar statements to other persons—all which he denied. These questions were avowedly asked for the purpose of laying a foundation for impeaching him by showing that he had made statements out of court in reference to the matter, different from those now made under oath.

The court holding that such statements if made, related to matters wholly collateral, and not to the *res gestæ*, refused to allow the defendant to contradict him, by showing that he had made the statements which he denied having made. This also was erroneous. The statements related to the *res gestæ*, and the proposed contradiction, if shown, would have tended seriously to weaken his credibility.

Various questions were raised upon the charge to the jury, and several special requests were made by defendant to charge upon specific points, some of which were refused

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or charged in a modified form; and some were based upon hypotheses not warranted by any evidence in the cause.

We think it better to indicate what should have been the principles of the charge as a whole upon the points in dispute, than to consider the detached parts presented by the several requests to charge, which would tend rather to confuse, than elucidate the real questions involved.

No fault seems to have been found with the charge as it related to the distinction between murder in the first and second degree, or between murder and manslaughter.

The object of all the defendant's special requests was to obtain from the court a charge which should authorize or require the jury, upon certain supposed states of facts, to and the killing excusable homicide.

A correct idea of excusable homicide is not perhaps easily expressed by a brief abstract definition, without special reference to the facts of particular cases. We accordingly find the latter mode adopted in all the books. It has been thought safer to illustrate by particular instances, than to undertake to define, in advance, all the particular elements or combinations of facts which may render homicide excusable.

Of course, the enumeration of particular cases, does not exclude any others falling within the like principles.

But the principles which underlie and result from all the cases in which the homicide has been held excusable in self-defense, or in defense of one's family or persons standing in particular relation to him or of his property, are so fully and accurately stated in the opinion of my brother *Campbell* in *Pond v. The People, 8 Mich. 150,* that an attempt to enumerate them here, would be a mere repetition. The principles there laid down, apply equally to the present case upon certain states of fact which it was competent for the jury to find from the evidence.

That case, however, differed from the present in certain

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important particulars. There an actual attack upon the defendant's dwelling was going on, and the rioters were in the act of demolishing it, and a servant of the defendant, then in the house, was being violently and, to all appearances, dangerously assailed when the fatal shot was fired.

In the present case, no actual attack had been made upon the defendant's house, no forcible attempt to enter; and unless the defendant, when he stepped out of the house with the axe, was, as in his statement he claimed to be, actually struck by some one or more of the rioters, there was no actual attack made upon the defendant, or any one of his family. There was, however, evidence tending to show that, when the door was standing open, and the defendant and his father and mother were ordering the rioters off, the wads from some of the guns were fired into the house. The evidence also tended to show that the defendant knew or understood that the general and original object of the rioters in assembling there, was to annoy him and his family by the blowing of horns, ringing of bells, firing of guns loaded only with powder and wads, and by other noises, rather than personal injury to himself or any of his family. But there was also evidence that before the defendant stepped out, there were threatening cries among the rioters to "bring him (or fetch him) out" or "to bring or fetch them out" which must have referred to the defendant, and perhaps to his wife, and possibly to his father and mother.

Considering the case first, with reference only to the facts existing prior to the time when the defendant went out with the axe, and without reference to the peculiar effects produced by the conduct of the rioters upon his mother, there was nothing, I think, in the evidence fairly tending to show a state of facts which would justify or excuse the defendant in rushing out and attacking any of the rioters with an axe, or other dangerous weapon, for the purpose of compelling them to desist or leave,

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though he might have been excused for attempting to drive them off by force, and even by blows with any instrument not calculated to endanger life or limb. But though, from the sudden, violent and capricious impulses to which an excited mob is always subject, danger may always be naturally apprehended, especially about a man's dwelling at night, whatever the original object of the assemblage may have been — and no one can estimate the nature or extent of the danger — yet, until some actual violence had been done or attempted in this case against either the house, or its inmates, the necessity which alone could excuse taking the life of any of the assailants, had not yet occurred, and might never occur. And though the defendant had the right to act under the circumstances as they appeared to him; yet up to this point (without reference to the defendant's mother,) there was nothing in the circumstances which fairly tended to show that he could have believed the dire necessity to have arisen.

2d. We will next inquire how far the case may be affected by the peculiar effects, produced upon the defendant's mother by the conduct of the rioters.

There was evidence from which the jury might have found that, owing to the feeble health of the mother and her peculiar infirmities, the fear and excitement caused by the conduct and threats of the rioters produced upon her alarming effects, from which the defendant might well have apprehended her speedy death if such conduct were allowed to continue. But to render this available to the defendant as an excuse for the homicide, the jury should also find that the rioters were informed of this condition of the mother, and the effects produced by their conduct; or that every reasonable and practicable effort had been made to notify them of the facts — as such are not the ordinary effects of such causes upon people generally, and therefore, would not naturally be anticipated by the rioters. But if

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they had such notice, or the defendant was prevented from giving it, by the noise and tumult of the rioters; then I can see no sound reason why the danger to the mother from their conduct, should not have excused the conduct of the defendant towards them, to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. And the defendant would, I think, have the right to resort to the same means of protection in the one case as in the other. What these means are, in what contingency they may be used, and how they are to be judged of by the defendant, will be considered under the next head.

3d. There was evidence — and the statement of the prisoner made on the trial must for this purpose be treated as such — from which the jury might have found (as supposed in part of the charge given by the court below) that the defendant took the axe from the house for the purpose of self-defense, and stepped out of the door for the purpose of inducing the rioters to leave, or of dispersing them; and that, as he stepped out, the crowd cried out "kill him, damn him, kill him," and that rushing towards him, some one or more of them hit him with a gun or club or other weapon. If this hypothesis should be found to be true, instead of the charge given by the court, the jury should I think, have been told substantially that the defendant was excusable for acting according to the surrounding circumstances *as they appeared to him:* and if, from those circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means, which would, under the circumstances, naturally occur to an honest and humane man, to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means

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resulted in the death of any of the supposed assailants, the homicide would be excusable.

"It is not to be forgotten that the rioters assembled there for an illegal object; for the purpose, by their own confession, of a wanton and unprovoked insult and defiance to the defendant and his family; that the unpleasant, and as it turned out, the terrible crisis, was forced upon the defendant against his will, by their criminal conduct. And while provocation, as such, cannot render the homicide excusable; yet in estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force, or kind of weapon to be used in repelling it, the excitement and confusion which would naturally result from the surrounding circumstances, for which the rioters alone were responsible, should not be overlooked. To require of the defendant, while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection and cool, deliberate judgment, in estimating the danger or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations no safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecessarily taking life, might, under the circumstances in which the defendant was placed, be likely to do.

As no fault was found with the charge in reference to the distinction between murder in the first and second degree, or between murder and manslaughter, it is unnecessary to consider the phases of the case which might call for a charge upon those questions.

A new trial must be granted.

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It is proper to notice the erroneous practice which has been resorted to in this case of bringing up the case upon a writ of error before judgment. There is in such a case no judgment to reverse, and no appropriate function to be performed by a writ of error. By reference to chapter 197, *Compiled Laws*, it will be seen that the record and proceedings, including the exceptions, should have been certified to this court by the clerk, without a writ of error. But as the certificate of the clerk by way of the return to this writ, substantially complies with this requisition, this court is equally possessed of the case. *See Shannon v. The People, 5 Mich. 36.* No writ of error should have issued in the present case, and no assignment of errors was necessary.

The other Justices concurred.

John Dawson v. Margaret Dawson.

Divorce: Void marriage: Fraud: Satisfactory evidence: Declaration. To maintain a bill for divorce there must be satisfactory evidence sustaining the charge, irrespective of the declarations, confessions or admissions of the parties.

Heard April 24. Decided April 27.

Appeal in Chancery, from Barry Circuit.

The bill in this cause was filed to obtain a decree annulling a marriage on the ground of fraud.

The cause was heard on pleadings, and proofs, and a decree granted as prayed for.

The facts are stated in the opinion.

H. M. & W. E. Cheever, for appellant.

James A. Sweezey, Geo. H. Prentiss, and *T. Romeyn*, for defendant and appellant.

GRAVES J.

This suit was brought by the husband against the wife

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to obtain a decree annulling the marriage between them, on the alleged ground that complainant's assent to the marriage was obtained by the fraud of the defendant. The fraud imputed to the defendant was her concealment of the fact that she was pregnant; and to support the charge, it was incumbent on complainant to establish by satisfactory evidence that he was actually deceived, and to that end to negative any legal inference, that he knew, or, as a man of ordinary intelligence, had reasonable ground to believe, what the defendant's condition was. This, we think, he has failed to do, even if all the testimony before us and bearing upon the question, is deemed satisfactory testimony in a cause of this description. But there is another view of the cause which appears to us to be fatal. The statute declares that "No decree of divorce, or of the nullity of a marriage, shall be made solely on the declarations, confessions, or admissions of the parties; but the court shall in all cases require other satisfactory evidence of the facts alleged in the bill for that purpose." *Comp. L.* § *3261.* If the "declarations, confessions and admissions" of the parties to this case were stricken from the record, nothing would remain to sustain the charge of fraudulent deception but the oath of the complainant and such deductions from the conduct of the parties as, in respect to such persons and such a transaction, could be properly drawn; and if this test should be applied, it would, we think, be quite manifest that the other satisfactory evidence required by the statute of the facts alleged in the bill would be wanting.

It is, however, by no means certain that the most material part of the complainant's deposition, aside from the portion which narrates statements and admissions of defendant, would not in strictness be considered as within the mischief the statute was meant to remedy.

These considerations are sufficient to show that if we give to the declarations, confessions, and admissions of the parties all the weight which can be claimed for them in this

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case, there will still be lacking the other satisfactory evidence that complainant was deceived as alleged.

The decree of the court below must be reversed, and one entered in this court, dismissing the bill, with the costs of this court.

COOLEY and CHRISTIANCY, JJ. concurred.

CAMPBELL J.

I think the complainant's case was sufficiently made out, and that the decree of nullity should be affirmed.

The facts are such that it is not desirable to enlarge upon them. I shall, therefore, content myself with merely expressing an opinion on the result.

Matilda Chapaton et. al. v. Milton H. Butler, et. al.

Costs when one suit is to abide the result of another. Where, by stipulation, it was agreed that one of two suits in Chancery, pending in this court, should abide the decision of the other:

Held, that the prevailing party was entitled to the same solicitor's fee in both cases, and in both courts, as well as actual disbursements, except the cost of taking the testimony and printing the record: that being allowed but in one case.

Heard and decided April 28.

Appeal in Chancery from Wayne Circuit.

This case was submitted at a former term of this court, with the case of *Campau v. Godfrey*, and it was stipulated that both should abide the decision of the latter. The testimony was taken, and the record printed only in the last case.

The bill in that cause having been dismissed with costs, the same decree was entered in this one.

The complainants objecting to full costs, the court held that the defendant was entitled to the same solicitor's fee,

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in both cases and in both courts, as well as actual disbursements; except for taking testimony and printing record, that being allowed but in one case.

The People ex. rel. William Cuthbert v. The Common Council of Detroit.

Mandamus: Public office: Common Council. A writ of mandamus is not the proper proceeding to try the right to a public office.

Heard and decided April 28.

Motion for a *mandamus.*

The relator claimed to have been elected by the Common Council of Detroit to the office of assessor; but that the Council wrongfully deprived him of the office by refusing to count the vote of one of the members in his favor. He therefore applied for a mandamus to compel them to count such vote, and to declare him elected.

D. C. Holbrook, for the motion.

The Court held that *mandamus* was not a proper proceeding to try the right to a public office, and declined to make an order to show cause.

Jehiel H. Montgomery v. Jane A. Merrill.

Bank charter: Forfeiture: Repeal: Collateral proceedings. Plaintiff obtained a sheriff's deed on sale of certain real estate, under a judgment against the Calhoun County Bank in 1859, and which became operative in 1860.

A Receiver was appointed for the Bank, under the act "to provide for proceedings in Chancery against corporations," in June, 1844, *ex parte* and before hearing. After qualifying, no proceedings were taken by him, and no assignment was made to him, and he died in 1851; and no further steps were taken in the suit in which he acted by any one, and no claims were presented against the bank.

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MONTGOMERY *v.* MERRILL.

In 1842 a law had been passed to repeal the charter of said bank, with others, providing, however, for an exemption in case of compliance with certain provisions. The charter of the bank expired in 1857, and all rights of action in reference to it under the statute — *Comp. L.* § *701* — became barred, more than three months before the plaintiff's deed became operative.

Held, That the said law of 1842 did not repeal the charter so that a forfeiture could be ascertained without judicial sentence, and that therefore the title to land could not be absolutely divested from the bank before a hearing of the proceeding to determine the fact of forfeiture.

Much less could the fact be determined in a collateral proceeding.

Ejectment: Receivership: Execution-title. In an action of ejectment to recover said premises under the execution title: *Held*, that while a decree of forfeiture if granted, might have related back to the beginning of the receivership, yet without such adjudication, the receiver's title to the bank's assets remained conditional and inchoate, and amounted to but a possessory right for the purposes of the suit. The legal title therefore to said land never vested in the receiver, and it was subject to levy and sale.

Whatever may be the effect of a temporary receivership in creating priorities, or as regards possession, the statute authorizing lands to be sold on execution, is inconsistent with the idea that as against the debtor himself such a levy would not be good when he has made no assignment to the receiver. When the right of a receiver terminates, and he has made no sale or other legal disposition of the land, the execution-title will stand as if there had been no receivership.

Enforcement of legal rights: Reasonable time: Laches. Under a statute designed to produce a speedy determination of all matters involved, the law will not allow a creditor to wait indefinitely without applying to the court within some reasonable time to compel a suit to proceed. And when the rights of creditors have become barred, such a receivership ceases to be operative for any purpose.

Every trust in land ceases as soon as the purposes cease for which it is created. — *2 C. L.* § *2653.*

Heard April 28. Decided May 4.

Error to Calhoun Circuit.

This was an action of ejectment, brought to recover the possession of certain premises situated in the city of Marshall.

The plaintiff claimed, by virtue of a sheriff's deed, based upon a judgment recovered against the Calhoun County Bank.

The defendant relied upon an alleged outstanding title of the receiver of the bank.

Judgment was rendered in favor of defendant.

The facts are stated in the opinion.

S. T. Douglass, and *George Woodruff*, for plaintiff in error.

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The plaintiff claims under a sheriff's deed. The defendant shows no title in himself, but relies for a defense in the outstanding title of the receiver.

1. An outstanding title in a third person to be a good defense in ejectment, must be a valid and subsisting title — one upon which a recovery might be had in ejectment, — *Macdonald v. Scheider, 27 Mis. 405; Moreau v. Dechemendy, 18 Id. 522; Dicloinson v. Collins, 1 Swan. 516; Hunter v. Cochran, 3 Barr. 105; Jackson v. Hudson, 3 Johns. 388; Salter v. Williams, 10 Geo. 186.*

2. It is doubtful whether any title to the premises was ever vested in the receiver. No assignment was executed to him; and although the act of 1837 declared that the receiver, when appointed, should be vested, as trustee, with all real and personal estate of the bank (L. 1837, p. 307, § 5), yet a subsequent statute, which was in force when the receiver was appointed, required that all trusts, excepting such as might arise or result by implication of law, should be created by instrument in writing. (R. S. 1838, p. 261, § 27.)

3. But the title, if any, which was vested in the receiver, was that of a mere trustee for the purpose of converting the property into money, and paying the debts of the bank and dividing the surplus, if any, among its shareholders, in case it should be proved that the bank was insolvent or had violated any of the provisions of its charter, and was therefore decreed dissolved. And the suit against the bank must be held to have become dormant by failure to prosecute it with reasonable diligence, and the trust in the receiver to have come to an end. All claims against the bank, except the plaintiff's, even judgments not revived, had become barred by the statute of limitation before our levy was made.

4. The receiver's title, if any he had, had been extinguished at the time of the trial of this cause, in 1863, by the adverse possession of the lessor of the defendants for more than twenty years. Hence it was not, at that time, a

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valid and subsisting title.—*Jackson v. Hudson, 3 Johns. 386.*

5. There was nothing in the pendency of the suit of the Attorney General against the bank to prevent the plaintiff from prosecuting his suit against the bank.—*Willard Eq. Jur. 790.*

Wm. H. Brown, for defendant in error.

The title, if the bank had any, vested in the receiver duly appointed by the Chancellor.—*Laws of 1837, p. 306, § 5.*

Such receiver shall thereupon be vested as trustee, with all the real and personal estate.—*Walk. Ch. 90; 23 Maine, 318; 13 Ohio, 298.*

A defunct corporation cannot be sued. There is no party to come before the court. The trustee or receiver is the only person who can be brought before the court.—*13 Ohio, 298–9; Act of 1836, L. of '36, p. 224, § 15, p. 226, § 23, 24; 1 Comp. L. p. 701.*

The receiver's title had not expired. The suit by *Ketchum,* the receiver, v. *James M. Parsons,* commenced in May, 1845, adjourned from time to time until April, 1848, last adjournment. It had not abated.—*R. S. 1838, p. 475, § 32; Id. p. 527, § 1; Burr. Pr. 282; 10 Wend. 540; 1 Denio, 53; 2 Comp. Laws, 1307, § 4908, 4909.*

The suit was not abated by death or removal.

The receiver takes under the law, and not under the corporation.—*Edwards v. Receiver, 166; 1 Seld. 320.*

CAMPBELL J.

Plaintiff having obtained a judgment in 1840, against the Calhoun County Bank, sued it over and obtained a second judgment thereon, in November, 1858, upon which he took out execution, on which the premises in controversy in this suit were sold March 19, 1859. The re-

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demption having run out, plaintiff's deed became operative in due course of law in June, 1860. On this he brought ejectment, and defendant, not having shown a valid title of her own, set up in defense an outstanding title under a receivership, the history of which shows that on the 14th day of February, 1844, the Attorney General filed a bill against the bank, under the act of June 21, 1837, to "provide for proceedings in chancery against corporations, and for other purposes." On this bill an injunction issued at its date, and on the 5th of March, an order for appointing a receiver was made, and on June 4th, upon the coming in of the master's report, George Ketchum was appointed receiver and qualified. No further steps were ever taken in the case, and the receiver died in 1851. During his life time he had commenced an action of ejectment for this land against defendant's lessor, which never came to trial.

In order to understand the points presented, it will be necessary to refer briefly to some statutes bearing upon the legal rights of the several parties.

The Calhoun County Bank was chartered in 1836, and was to continue in existence until March 1, 1857, but subject to repeal by a two-thirds vote of the legislature. On February 16, 1842, an act was passed to repeal the charters of several banks therein named, including the Calhoun County Bank, but providing by a subsequent section, that this and three other banks named should be exempt from its provisions, if they should comply with the act to repeal the suspension act, and should continue to do a legitimate banking business. The same statute authorized any creditor to apply to the chancellor for a receiver, and provided that the receivers should proceed in like manner, and have the same powers with receivers appointed under another statute relating to certain other banks, and passed the day before. *L. 1842, 56, 61, 62.* Those powers were substantially the same conferred by the general acts, which gave receivers the

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same authority with trustees of insolvents, and vested in them the estate real and personal.—*L. 1839, p. 96.*

It is claimed by the defense that this corporation became defunct, and that the title to all the realty vested absolutely and in fee in the receiver.

It cannot be seriously contended that the act of 1842 repealed the charter so that a forfeiture could be ascertained without a judicial sentence. The bill filed in 1844, on behalf of the state, assumes the bank to be still existing, and prays forfeiture for cause. Apart from such a recognition, it would be contrary to legal principles to leave such a question open to be determined collaterally.

The receiver, being appointed *ex parte*, and before a decree of forfeiture, can only be regarded as holding provisionally. It would not be competent for legislative authority to divest a title absolutely before a hearing, for until that time it could not be known whether there was any forfeiture, and, therefore, nothing could be established justifying complaint against the bank. A decree of forfeiture might very well justify the relating back of the title to the beginning of the receivership; but, on the other hand, this title, until adjudication, must be conditional and inchoate, and amount to no more than a possessory right for the purposes of the suit.

It must follow, upon similar principles, that the receiver's right, being purely for the purposes of the suit, could not outlast the suit, nor be used for any purposes not justified thereby. It is a statutory, as well as elementary principle, that every trust in land ceases as soon as the purposes cease for which it is created.—*2 C. L. § 2653.*

The purposes for which receivers were appointed were, first, to pay creditors; and second, to pay any balance not needed for that object, to the stockholders. *L. 1839. 98, 99.* But if the corporation was not dissolved, then of course, neither of these purposes could be carried out.

The law directed receivers, immediately upon their ap-

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pointment, to give notice requiring creditors to appear within forty days after the first publication of notice. *L. 1839, p. 97; R. S. of 1838, p. 608.* It contemplated that a first dividend would be made within a year, and a second, if there should be assets, within eighteen months, and that whenever, at the time of making a dividend, there should not have been debts enough proved to absorb the assets, the surplus should be given to the stockholders. *L. 1839, p. 99; L. 1841, p. 42–3.* By the general laws of the state it was then, and has since been provided, that suits must be commenced within three years after a corporation expires, if not previously outlawed.—*R. S. 1838, 229; 1 C. L. 701*

It can hardly be supposed that, under a statute designed to produce a speedy determination of all matters involved, a creditor could be allowed to wait indefinitely without applying to the court within some reasonable time to compel the suit to proceed. But it is unnecessary for us to determine how much diligence would be required; for certainly no one could apply when his cause of action was absolutely barred. *Godfrey's Estate, 4 Mich. R. 308.* As the charter of the bank expired March 1, 1857, the right of action in every case became barred March 1, 1860, which was more than three months before plaintiff's deed became operative. As the legal estate had never vested in the receiver, the land was subject to levy and sale. Whatever may be the effect of a temporary receivership in creating priorities, or in regard to possession, we think the statute authorizing lands to be sold on execution, is inconsistent with the idea that, as against the debtor himself, such a levy would not be good when he has made no assignment to the receiver. And when the right of the receiver terminates, and he has made no sale, or other legal disposition of the land, the execution title will stand as if there had never been a receivership.

When the title of plaintiff became complete, the purposes of the receivership had ceased for some months, if not for many years. The chancery suit had ceased to be capable

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of revival, and must be regarded as abated by the incapacity of any one to further complain of the extinct corporation — the expiration of the charter alone not necessarily leading to this result, but there being no one who could claim to interpose to enforce prosecution.

We think the plaintiff was entitled to have his deed sustained as unaffected by the receivership, and that the ruling which held it invalid, was erroneous.

The remaining question becomes immaterial. The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Charles C. Waldo v. James B. Simonson.

Statute of frauds: Promise to pay the debt of another. Where one claimed an interest in certain goods, and agreed not to attach them, in consideration that another claimant who proposed to attach, had agreed verbally to pay him the amount due from the person for whom the goods were bought:

Held, that this was an agreement to pay the debt of another, and therefore within the statute of frauds.

The supposed debt subsisted equally after the alleged promise as before. The promise was a mere additional assurance.

Heard April 29. Decided May 4.

Error to Oakland Circuit.

This was an action brought to recover a certain sum of money alleged to have been promised to plaintiff by defendant. The plaintiff declared specially, and on the common counts.

On the trial, plaintiff testified "that in 1866, he and defendant were engaged in buying wool in Holly; that in July of that year a man calling himself Walker, came to Holly for the purpose of buying wool, and made arrangements with the defendants to purchase wool for him. While he was there he had a draft for $5,000, purporting to have been drawn by E. Wendell, on the First National

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Bank of Detroit, to the order of Thomas McGraw & Co., which draft was indorsed by Thomas McGraw & Co.; that said Walker wished plaintiff to go to the bank in Holly, and help him get the money. Plaintiff went to the bank with said Walker, but they would not let Walker have money except on plaintiff's indorsement. Plaintiff then, at said Walker's request, indorsed said draft, in the bank, and they drew $900 on it.

That after this, and on the same day, witness aided Walker in buying wool with said money, and they bought about seven hundred pounds, at a cost of about fifty-eight cents per pound; and they paid for other lots, purchased by defendant, and the same was placed with the wool defendants had purchased for said Walker in their warehouse. On the day following it was discovered that the person calling himself Walker had run away, and Charles C. Waldo and the plaintiff went over to the bank and had a talk with the banker, Latourette, about it, and it was agreed, as between themselves, that they should have no law about it. Plaintiff and C. C. Waldo agreed with said Latourette that said draft need not be protested; they would pay it as soon as the wool was sold. Waldo then agreed to pay the plaintiff the amount of money that had been put into the wool, that came from the money got on the draft. Plaintiff had expected to attach the wool on his own account, but upon Waldo's making that agreement to pay him, he agreed not to do so, and they agreed between themselves that both their claims should be put together, and there should be but one attachment suit about it.

That the money referred to, was the amount of plaintiff's money that had gone into that wool: Money on account of the draft, $550.00. He assented to this, and rested easy until towards night. While at the bank Latourette, the banker, said the draft was a base forgery. Waldo

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said to him, "you hold on to the draft a few days, till after the wool is sold, and we will come in and pay the draft." The draft was then in Latourette's hands. He said to his clerk, "lay it away. You need not protest it. These gentlemen will come in and pay it without expense."

After that, witness had a conversation with defendant, A. P. Waldo, and agreed that they would come to Pontiac to see about it and secure themselves. We agreed that we would have but one suit about it, if necessary to commence a suit. I went away for a short time, and when I returned I saw the Waldos, and they said they had attached the wool for both our claims.

Witness further testified: "Since that, I have had several conversations with them. A. P. Waldo told me he had sold the wool, and C. C. Waldo bought it at forty-eight cents. A. P. Waldo said it was right; I should have my pay; that his father had the wool, and ought to pay for it. He said he and his father were in partnership, and intended to divide the profits. Witness said he paid the $900 on the draft to Latourette, eleven days after he had indorsed it. Witness understood that, including this wool that his money paid for, there was purchased, in all, by the Waldos, on account of Walker, about 3,300 pounds; and that Walker had not furnished any of the money for the purchase. Witness said after the wool was sold, he had a conversation with C. C. Waldo, and made a proposition to him to settle up, and C. C. Waldo said he wanted to see A. P. Waldo, as he was equally interested, and he made an appointment to meet witness. Walker was subsequently arrested and his name proved to be Wolcott. No writing passed between the parties relative to this matter.

The plaintiff also testified "that after the attachment, and before the sale, defendant, C. C. Waldo, come to plaintiff and told him he could get forty-eight cents per pound

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for the wool, and asked him if he was willing to take that for his share, or interest, in the wool, and the plaintiff told him he was."

The defendants introduced testimony tending to contradict said agreement to pay plaintiff any part of the money received on sale of said wool.

On plaintiff's request, the court charged the jury:

1. That the agreement not to prosecute a claim when due, is a sufficient consideration for a promise.

2. If the defendants, in consideration that the plaintiff would omit to take legal proceedings on his own behalf, to secure the amount paid on the forged draft, or would omit to disturb them in the possession of the wool, if this was of benefit to said defendants, it is an original promise of the defendants, and not within the statute of frauds.

3. That a transfer of the claim of Simonson to defendants, of the amount of his claim against Walker, or Wolcott, equal to the money put in the wool by him, or from the draft, would be a good consideration for a promise, and a promise to pay that amount, based upon such considerations, would constitute an original undertaking, and is not a collateral promise.

After declining to charge certain requests of the defendant, the Circuit Judge further said that, if the jury should find, from the evidence, that the defendants promised to pay the said plaintiff the amount of money due from said Wolcott, which went into the wool, from that obtained at Latourette's bank, upon the promise made by said plaintiff to withhold legal proceedings for the enforcement of his claim against Wolcott, or not to attach the wool, then in defendant's possession, and that such withholding legal proceedings would be of benefit to said defendants; then the promise would not be within the statute, and need not

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be in writing; but if the jury should find that the promise was a mere promise to pay the debt of Wolcott, without any consideration moving between the parties to this suit, of benefit or advantage to said defendants, then the contract would be within the statute, and void, unless in writing; and that the parol agreement not to attach said wool was a sufficient consideration for a promise.

The jury found a verdict for plaintiff.

Baldwin & Look, for plaintiff in error.

1. The assumed contract in this case, if any, was one to pay the debt of another. Simonson testified "that Waldo agreed to pay him the amount of money that had been put into the wool, that came from the money got on the draft."

This, in connection with all that was said, does not answer any of the requirements of the statute of frauds.— *2 Comp. Laws, 944.*

The testimony about his not commencing an attachment suit on account of it, amounted to nothing, as Waldo received no consideration from Simonson, and Simonson parted with nothing. He retained the draft in his own hands. He was the person liable, and there was no liability in any manner attaching to Waldo; and, at the time this conversation was had, Wolcott was not indebted to Simonson, and he (Simonson) had paid nothing on account of the draft.— *Brown v. Hazen, 11 Mich. 219.*

This case comes clearly within the statute of frauds. It was a parol promise to pay the debt of Wolcott. The statute was intended for some beneficial purpose, and if it can be varied and held for naught in this case, it would require but very little ingenuity to entirely nullify its provisions.— *2 Comp. Laws, 944; Mallory v. Gillett, 21 N. Y. 411; Brown v. Haven, 11 Mich. 219; Jackson v. Raynor, 12 Johns. 391; Simpson v. Patten, 4 Id. 422; Rogers*

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v. Rogers, 6 Jones, N. C. 300; Westheimer v. Peacock, 2 Green, Iowa, 528; Hull v. Soule, 11 Mich. 494; Larson v. Wyman, 14 Wend. 246; Payne v. Baldwin, 14 Barb. 570; Eddy v. Roberts, 17 Ill. 505; Curtis v. Brown, 5 Cush. 491; Watson v. Randall, 20 Wend. 201; Nelson v. Boynton, 3 Met. 396; Stone v. Drinker, 2 E. D. Smith, 401; Bresler v. Pendel, 12 Mich. 224; 11 Id. 494.

The rule is well settled by the whole current of authorities, "that while the old debt remains, the new contract cannot be substituted, but is only a collateral one." And "if the liability of the original debtor continue, the promise of another to pay his debt, should be in writing." — *Shoemaker v. King, 40 Penn. St. 107; Rogers v. Brooks, 6 Jones, N. C. Law, 303; Westheimer v. Peacock, 2 Greene, Iowa, 521; Curtis v. Brown, 5 Cush. 492; Kingsley v. Balcome, 5 Barb. 139; Brady v. Sackrider, 4 Sandf. Law, 515; State B'nk. v. Mettle, 2 Bosw. 396; Farley v. Cleveland, 4 Cow. 432; Barker v. Bucklin, 2 Denio, 57.*

Each of the foregoing cases recognize the doctrine of the extinguishment of the original debt. Such is the rule, and Simonson, in this case, after the pretended promise, attached property of Wolcott's, and took judgment for his whole claim.

2. The court erred in charging the jury as requested by the attorney for Simonson, "that the agreement not to prosecute a claim when due is sufficient consideration for a promise." This was an abstract proposition of law not warranted by the case, and tended to mislead the jury.

The court also erred in charging the jury, "that if they shall find from the evidence that the defendants promised to pay the plaintiffs the amount of money due from said Wolcott, which went into the wool from that obtained from Latourette's bank, upon the promises made by said plaintiff to withhold legal proceedings for the enforcement of his claim against Wolcott, or not to attach the wool then in defendant's possession, and that such withholding legal pro-

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ceedings would be a benefit to said defendant, the promises need not be in writing." In the foregoing proposition it is nothing but an undertaking for the debt of another, for the debt still subsists.

The court also erred in charging the jury, "that the parol agreement not to attach was a sufficient consideration for a promise.

M. E. Crofoot and *M. S. Brewer*, for defendant in error.

The case at bar is an original contract between the parties, and not collateral; and it is based on a sufficient consideration passing between the parties in this case, which was that said plaintiffs in error would pay to said defendant, Simonson, the above sum of five hundred and fifty dollars and fifty cents (the amount of money procured from Latourette, which went into the wool) in case Simonson would not attach or disturb the possession of the wool, but would let it remain and be sold together by said plaintiffs in error, which agreement was fully performed by said Simonson, on his part.—*2 Pars. on Cont. 305; Farley v. Cleveland, 4 Cow. 432; Myers v. Morse, 16 Johns. 424; Meech v. Smith, 7 Wend. 315; Brown v. Comstock and note, 2 Coms. 225; Nelson v. Boyington, 3 Met. 396; 8 Mich. 51; 12 Id. 10; 16 Id. 478; 21 N. Y. 412; 6 Yerg. 508.*

2. The agreement on the part of said plaintiffs in error was not made for the purpose of benefitting, in any manner, Wolcott (or Walker), but solely for their own interest.

3. Plaintiffs in error proceeded to perform the conditions of the agreement on their part, and went so far as to attach the whole amount of their part, and, in such attachment suit, added to their own claim against Wolcott (or Walker) the sum of five hundred and fifty dollars and fifty cents of the claim which Simonson held against Wolcott, and took judgment for the whole amount.

4. There was proof tending to show that only one suit was to be commenced against Wolcott, to secure the claim

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of the plaintiffs in error, and five hundred and fifty dollars and fifty cents of the claim of defendant in error; that, in accordance with said agreement, said Aaron P. Waldo commenced said suit against Wolcott, and recovered judgment for the whole amount of their own claim, and the amount above mentioned of Simonson's claim, with the consent of Simonson — Simonson thereby virtually assigning to said Waldos that amount of his claim against Wolcott, for which they (Waldos) were to pay Simonson, when the wool was sold, $550.50; and they would be equitably bound at least to account to him in proportion to the amount which they succeeded in collecting on their judgment, and this seems to have been the view taken by the jury in the court below.

2. It is insisted by the plaintiffs in error, that Simonson cannot recover, for the reason that the full amount of his original claim against Wolcott (or Walker) still existed. This, perhaps, might be so had the original indebtedness of Wolcott to Simonson been the inducement or consideration for said plaintiffs' promise; but where the promise of the newly contracting parties is based or founded on a new consideration, which moves to the promiser, defendant in error is entitled to recover, although the original debt remains. — *Mallory v. Gillett, 21 N. Y. 422, 434; Farley v. Cleveland, 4 Cow. 432.*

3. The proof shows that, as soon as the defendant in error learned that the draft was a forgery, he immediately went to the bank and requested Latourette not to have the draft protested; that he would pay the money in a few days; to which Latourette assented, and, relying on said promise, he did not protest the draft, and Simonson paid the money to him, according to his agreement. If this be so, then Latourette, by entering into such verbal contract with Simonson, released Wolcott, and relied wholly upon

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Simonson's promise, and Simonson had an immediate claim against Wolcott — as much so, as if he had paid Latourette the nine hundred dollars at the time he made the promise.

4. An agreement with defendants to forbear suit against Wolcott, was a good consideration for the promise of the plaintiffs in error to pay the five hundred and fifty dollars and fifty cents.—*Rood v. Jones, 1 Douglas, Mich. 188; Chitty Cont. 35; 1 Pars. on Cont. 367.*

GRAVES J.

Assuming that the defendant in error was damnified by forbearing to attach the wool, and that the promise to pay him, imputed to plaintiff in error, was, upon sufficient consideration—a view which is essential to the theory of the former—still that promise was, on such theory, one to pay Wolcott's debt, and within the statute.

According to the construction put upon the transaction by the defendant in error, Wolcott was indebted to him in so much of the proceeds of the endorsement of the forged draft as went into the wool, and it was this debt which the plaintiff in error undertook to pay. Admitting that it is shown by the circumstances that such debt was created, and the defendant in error was legally entitled, before the promise, to seize the wool by attachment against Wolcott for the debt, nevertheless the supposed debt subsisted in as ample a manner after the alleged promise as before. It was neither paid, discharged, nor extinguished. The liability of Wolcott was unaltered, and the defendant in error obtained only the additional assurance of plaintiff in error.

By the charge, the jury were left to find for the defendant in error, upon the promise founded on forbearance to attach, in case they should find that such forbearance was

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beneficial to the plaintiff in error, and this, I think, was incorrect.

There seems to have been no investigation by the court or jury of the right of defendant in error, on the facts, to recover, under the count for money had and received, any portion of the proceeds of the wool sold on the execution, in favor of plaintiffs in error; and we forbear discussing that subject.

I think the judgment of the Circuit Court should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Joseph M. Martin v. Elijah Hamlin.

Agreement; Parol evidence: Deed: Description: Mistake as to legal effect. Complainant entered into a verbal agreement with defendant to purchase of him a farm occupied by him, and well known to both; but which had never been surveyed. A few days prior to the execution of the deed and mortgage and notes for purchase money, defendant verbally represented the land to complainant as containing 110 acres, and that he would warrant that quantity; and it was also verbally agreed that complainant should get the land surveyed, and if the amount fell short, the deficiency should be endorsed on the mortgage.

The description in the deed, a warranty, was according to the government subdivisions, and it called for 110 acres.

No fraud or mistake is charged by complainant. Upon a survey made some months after, a deficiency of 16¼ acres was discovered.

In a bill to compel defendant to endorse upon the mortgage the amount of said deficiency:

Held, that the verbal agreement was merged in the deed, and, must, in the absence of fraud, be presumed to contain all the terms finally agreed upon.

Held further, that the said parol agreement would contradict and vary the notes and mortgage, given by complainant, as part of said transaction, and that this rule of evidence applies as well in equity as at law.

Mistake as to the legal effect of an instrument, constitutes no ground of relief.

Heard April 30. Decided May 4.

Appeal in Chancery, from Oakland Circuit.

The bill in this case was filed to compel the defendant to indorse certain moneys upon a note and mortgage given

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for the payment of the purchase money of premises purchased of defendant, by reason of an alleged deficiency in the number of acres supposed to have been bought.

It appeared that complainant bought of defendant a farm described in the deed to complainant as the "West part of the northwest quarter of section thirty-two, in township three, north of range eleven east, except ten acres off the west side. And also the south half of the west half of the northeast quarter of section thirty-two in said town, all lying and being in the township of Avon, in the county of Oakland, and State of Michigan, containing one hundred and ten acres of land."

The bill alleges that the purchase and the deed were made in pursuance of a bargain, or understanding, that complainant should pay $4,200 for the farm (part cash and part on time,) provided that defendant would warrant the farm to contain 110 acres, which it is alleged the defendant agreed to. That the deed was made in pursuance of this understanding or agreement; that at the time the deed was executed and delivered, complainant paid defendant $2,700, and it was at the same time agreed that complainant should at some future time get the farm surveyed and the quantity ascertained; that, to secure the balance of the purchase money, it was agreed complainant should execute a mortgage upon the premises, and that complainant, at the request of the defendant did, on the same day, execute to defendant a mortgage for $1,500, and three promissory notes secured thereby, for $500 each, payable respectively, Oct. 1, 1865, Oct. 1, 1866, and Oct. 1, 1867; the defendant agreeing at the same time that complainant might go on and get the farm surveyed, and that, if it fell short of 110 acres, defendant would endorse upon the notes and mortgage the deficiency (at the rate of 110 acres for $4,200); and the parties further agreeing that, if the farm should overrun, complainant should pay for the excess at the same rate.

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That complainant went into, and has continued in possession; that, some time afterwards, complainant caused the farm to be surveyed by the county surveyor, and that the amount upon such survey was ascertained to be only 93½ acres; that defendant now refuses to allow or endorse the amount corresponding to such deficiency.

The bill therefore prays that defendant may be decreed to make such endorsement.

The defendant, by his answer, denies any such agreement as alleged in the bill, or any agreement except what appears by the deed, mortgage, and notes, or that he, in any way, undertook to guaranty the quantity.

The prayer of the bill was granted.

M. E. Crofoot, for complainant.

It is claimed that the case stated and made by complainant is not one of equitable relief.

We place our right to relief upon three grounds:

a. Mistake of the parties as to quantity, and, therefore, as to consideration, which we claim to have corrected.

b. The right of the complainant to have the amount indorsed and applied upon the notes and mortgage, and thus remove an incumbrance to that amount on his land — to remove it to that amount as a cloud upon his free title.

c. That the complainant has a right to have the application made, and thus abate so much of the mortgage; and to have the amount endorsed, and thus compel the defendant to specifically perform his agreement.

1. The bill clearly shows that the defendant made a statement as to quantity, viz: 110 acres, when there was but 93½ acres, and in this a misstatement as to that amount: Not a fraudulent representation, but a misrepresentation upon which the complainant relied.

It can make no difference with this right to equitable relief, that the representations amounted also to a warranty.

Relief from such misrepresentations is within the juris-

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diction of courts of equity, and is treated of as compensation for deficiency.—*1 Sugden on Vend. 6th Am. 10th Lond. Ed. chap. 3, entitled, Of defects in the quantity of the estate; See also notes 372 to 374; Willard's Equity, p. 72; Hill v. Buckley, 17 Vesey, 395, 401, 402, 403; Winch v. Winchester, 1 Vesey and Beames, 375; Belknap v. Seeley, 2 Duer, N. Y. 570; Young v. Craig, 2 Bibb, Ky. 270; Reynolds v. Vance, 4 Id. 215; Marvin v. Bennet, 8 Paige, 312; Id. 26 Wend. 169; Stebbins v. Eddy, 4 Mason C. C. 414.*

a. The relief is only granted when there is an agreement as to quantity: and quantity formed an essential element of the contract.

When this appears, the right to relief in equity is unquestioned.

But if it be uncertain, from the agreement, that the vendee relied upon the statements of the vendor as to quantity; or that he waived it by accepting a conveyance with qualifying words; or that the land was conveyed and accepted by metes and bounds, then there is no ground for relief. Such are the facts disclosed in *Reynolds v. Vance, 4 Bibb, 215; Root v. Puff, 3 Barb. 358; Jackson v. McConnell, 19 Wend. 175; Ketchum v. Stout, 20 Ohio, 453.*

It cannot be claimed that this land was conveyed by metes and bounds; therefore, the description of quantity is immaterial. The term used in the deed is "the east part of the northwest quarter."

No inference can therefore be drawn from the deed that the words of quantity were not the words of the contract.

b. It has been held, in some of the cases, that it was necessary to allege, and to show fraudulent representations; but the more recent cases follow the case of *Hill v. Buckley,* holding that when a misrepresentation was made as to quantity, though innocently, the vendee is entitled to relief by way of an abatement, or a recovery of the consideration, although no fraud is alleged or shown.—*Hill v. Buckley,*

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17 Vesey, 395, 401–2; Marvin v. Bennett, 8 Paige, 312, 314, 315; Id. 26 Wend. 169; Chancellor's opinion, Id. 172; Verplanck's opinion, 184; Ketchum v. Stout, 20 Ohio, 453, 459, 460; Belknap v. Seeley, 2 Duer, N. Y. 570; Emmett's opinion, Id. 578, 580–1; Daniel v. Mitchell, 1 Story, 172; Young v. Craig, 2 Bibb, 270–1.

2. We claim that the complainant had a right to have this cloud removed as a lien on his land, for these reasons:

a. It was important to him, as he had bargained his land away to sell subject to the incumbrance, to know the extent of incumbrance.

b. He feared Hamlin would transfer the notes and mortgage to prevent this application. He therefore had a right to resort to a court of equity for relief. — *Willard's Equity, 302 to 307; Hamilton v. Cummings, 1 Johns. Ch. 522.*

c. The complainant has a right to the specific performance of the agreement.

And the question of deficiency in quantity is treated under this head in *Adams' Equity, 3d Am. Ed. p. 270 to 273; §§ 89, 90, 91; Willard's Equity, 273, 274, 275, 288, 289; Gillespie v. Moon, 2 Johns. Ch. 599; Kessel, brack v. Livingston, 4 Id. 148; Coles v. Bowne, 10 Paige, 533.*

2. The main point insisted upon in the court below, and which we suppose will be here, is that parol proof cannot be introduced to vary or explain a written contract, or deed; that the covenants in the deed do not at all apply to the quantity; that the quantity expressed in the deed is merely descriptive of the land.

We claim that the proof offered was only an inquiry into the consideration of the mortgage and the deed; and whatever may appear to have been the rule heretofore, by the numerous authorities cited by the counsel for the defendant, this court has expressly adjudicated upon this

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point. — *Robinson v. Cromelien, 15 Mich. 316; Bennett v. Beidler, 16 Id. 150; Bowker v. Johnson, 17 Id. 42.*

A. C. Baldwin, for defendant.

On the face of the bill, the party is not entitled to relief. If there was a mistake in the preparation of the deed, complainant should have taken steps to have it reformed.

The complainant's evidence in this case assumes to show that the verbal contract, if any, was made before the writings were drawn; that the land was to be surveyed, and the deficiency to be applied on the notes. The rule is well settled, both in law and equity, that all conversations, and all prior contracts of the parties are merged in the first written agreement. — *Street v. Dow, Har. Ch. 428; Oelricks v. Ford, 23 How. U. S. 49; Stevens v. Cooper, 1 Johns. Ch. R. 429; 5 Mich. 222, 204; Crosier v. Acer, 7 Paige, 141; Cook v. Combs, 39 N. H. 593; Austin v. Sawyer, 9 Cow. 39; Stackpole v. Arnold. 11 Mass. 30; Dix v. Otis, 5 Pickering, 38; Conner v. Coffin, 22 N. H. (2 Foster) 543; Noble v. Bosworth, 19 Pick. 314; Powell v. Edmunds, 12 East. 6; Hoyt v. French, 24 N. H. 199; Lang v. Johnson, 24 N. H. 302, Hoxie v. Hodges, 1 Oregon, 251; Richardson v. Comstock 21 Ark. 69; Underwood v. Simonds, 12 Met. 278; 7 Wis. 532; Adams v. Wilson, 12 Met. 128; Oskaloosa College v. Stafford, 14 Iowa, 152; 2 Pars. on bills, 501-2-3.*

But it may be said the principle, in equity, is different. The rule is the same:

"And the rule that an absolute note cannot be varied by evidence, is held in equity as in law." — *Pars. on bills 502; Wesley v. Thomas, 6 Harris & Johns. 23; Chetwood v. Britton, 1 Green. Ch. 439; King v. Baldwin, 2 Johns. Ch. 557, 58; Eveleth v. Wilson, 15 Maine, 109; Richardson v. Thompson, 1 Humph. 154-5.*

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But it may be insisted that this was an independent agreement, distinct from any of the writings, to have the land surveyed, and that the defendant would then pay a pro-rata sum per acre for the deficiency. If so, the contract was void by the statute of frauds.—*2 Comp. Laws, § 3177.*

No part of this assumed contract was put in writing. No reference was made to it in any of the papers prepared, and a studied silence preserved while these papers were in process of construction. If such a parol contract was made, it was a portion of the original arrangement between the parties, and as such, cannot be valid—part parol and part written. If it were a valid parol agreement, the complainant has an adequate remedy at law, and cannot revert to a court of equity for aid.

Pending the negotiation, prior to the delivery of the deed, as the contract was not in writing, either could recede at pleasure. Then if the complainant accept a deed, it will be held conclusive that the whole contract was embraced therein.—*Houghtaling v. Lewis, 10 Johns. 297; Mumford v. McPherson, 1 Johns. 414, 3 Id. 506, 10 Id. 297; Schemmerhorn v. Vanderheyden, 1 Johns. 140; Howlson v. Barker, 3 Johns. 506.*

The notes in this case were for the payment of five hundred dollars each at the time fixed; and it is sought to annul the same by a prior and parol agreement.

"It is a firmly settled principle," says Parsons, "that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsing of a bill, or note, cannot be permitted to vary, or qualify, or contradict, to add to, or subtract from, the absolute terms of the written contract."—*2 Pars. on Bills, 501.*

And "the rule that an absolute note cannot be varied by evidence, is held in equity as in law."—*2 Pars. on Bills, 505, 506; Gozaway v. Moon, Harper & Sarg. 401;*

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Broad v. White, 1 Ala. 436; Featherston v. Wilson, 4 Id. 154; Gregory v. Hart, 7 Wis. 532.

CHRISTIANCY J.

The agreement set up in the bill in reference to a guarantee of the quantity of land, a survey of the premises, and an endorsement to be made on the mortgage for any deficiency, was, if any such existed, wholly verbal. Whether such verbal agreement was ever made, is a question upon which the evidence is conflicting, and much of it directly contradictory, leaving the question open to considerable doubt. But, without going at all into the question of the weight of the evidence, we propose to consider the case in the most favorable aspect to the complainant, which the testimony on his own part will warrant.

The case as presented by the evidence on the part of the complainant, including his own, is substantially this:

The defendant was residing on the farm at the time of the sale, and had resided there for some twenty-five years. Complainant and his father, who aided him in the negotiation, had also been acquainted with the premises for many years. There is no pretence on the part of complainant, that the actual boundaries of the land were not known by, and visible to, all the parties. But the defendant had never had it surveyed. At the time of the verbal arrangement for the sale, two or three days before the papers were executed, the defendant represented the land as containing one hundred and ten acres, and said he would warrant it to contain that quantity; and complainant thereupon, verbally agreed to purchase the farm, and pay four thousand two hundred dollars for it, if there should be that amount of land. This verbal arrangement was made at the defendant's house on the premises; and the parties were to go in a day or two after to Pontiac, and have the writings drawn. They met at Pontiac accordingly for that purpose. Mr. Car-

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hart, a justice of the peace, was employed at the suggestion of the defendant to draw the papers—a deed from defendant to complainant, and notes and a mortgage upon the land for part of the purchase money, and an assignment by the complainant to the defendant of another mortgage received as part of the purchase money.

Immediately before the papers were drawn, as the parties were going up into Carhart's office for the purpose, on, or at the foot of the stairs, a conversation was had between the parties in which it was verbally agreed, that complainant should or might get the land surveyed by the county surveyor, and if it fell short (of 110 acres,) an amount proportioned to such deficiency should be endorsed on the first payment to be secured by the mortgage complainant was to give for fifteen hundred dollars of the purchase money. If the land should overrun, complainant was to pay for the excess at the same rate, though it is not stated how or when. The parties then went into the office, and while Carhart was drawing the deed of the farm, the defendant wished him to insert the words "more or less" after the words at the close of the description, "containing one hundred and ten acres." But to this, complainant's father, acting on his behalf (though he was himself present,) objected; because they did not know, as he says, how much land there was, and they were to have it surveyed, or, as stated by the father in his testimony, "because the complainant had nothing but the defendant's word for the amount of land, but expected one hundred and ten acres." The verbal agreement was not stated to the justice, or in his presence. The deed was drawn without the words "more or less," and the complainant executed his three promissory notes for $500 each, and a mortgage upon the farm to the defendant securing the notes; having paid him in cash and by the assignment of a mortgage, the balance of the $4,200. Complainant says he delivered his mortgage and

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notes, relying upon the understanding above stated. The papers were exchanged. Complainant received the deed, and went into possession. No written agreement was executed or seems to have been contemplated by either of the parties as to the survey or the endorsement of any deficiency.

Upon survey made some months after by the county surveyor, the farm was found to contain but ninety-three and a half acres; and the defendant being called upon to endorse the deficiency, refused.

From this statement, it is clear:

1st. That the verbal agreement, if made as claimed by the complainant, constituted, while the matter remained in parol, a part of the terms of the entire contract of purchase and sale.

2d. That the papers drawn by Carhart, and executed by the parties, together with the payment of a part of the purchase money, were intended and understood by both parties as the consummation of the sale by the one, and the purchase by the other.

3d. That the omission to insert in the deed or mortgage, or a separate instrument, any stipulation with reference to a survey to be had of the land, or the allowance or endorsement for deficiency, was not the result of any mistake of fact, or of inadvertence from the subject not occurring to the mind of the complainant; but that the subject of such survey and deficiency was present to his mind during the drawing of the papers, and that the deed was drawn without the words "more or less," with the idea that it would operate as a guaranty of the quantity. That the parties knew the contents of all the papers executed; that all were executed and exchanged without any oversight or mistake of fact, in the very form intended by all the parties, and that they contained all that the parties intended should be contained in any written evidence of the transaction between them.

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It is not denied that, upon the face of the papers executed, and according to their legal effect, the complainant took the farm at his own risk as to quantity.—*Roat v. Puff, 3 Barb. 553*, and cases there cited. If in accepting the deed and exchanging papers, he did not intentionally abandon all claim of compensation for deficiency, he must have relied either, first, upon the quantity mentioned in the deed as a guaranty, or second, wholly upon the contemporaneous verbal agreement, or third, upon both together.

If he relied upon the first, it was a mistake of the legal effect of the instrument, the contents of which he knew—purely a mistake of law. This is no ground for relief. —See *Irnham v. Child, 1 Bro. C. C. 92; Townsend v. Stangroom, 6 Ves. 328, 332; Worrall v. Jacob, 3 Meriv. 267, 271; Hunt v. Rousmaniere, 1 Pet. S. C. R. 1; 2 Mason, 366; Gilbert v. Gilbert, 9 Barb. 532; Arthur v. Arthur, 10 Barb. 9; Farley v. Bryant, 32 Me. 474; Mellish v. Robertson, 25 Vt. 608.*

He can have no relief upon the ground of the verbal agreement alone, or in connection with the deed; because, first, to say nothing of the statute of frauds, it was a part of an entire contract for the sale of the land, made immediately preceding, and contemporaneous with the deed and other papers executed in consummation of the sale, and related to its very terms. It was, therefore, merged in, or cut off by the deed and other writings by which the sale was consummated, and which must, in the absence of fraud, be presumed to contain all the terms finally agreed upon.—*Street v. Dow, Harr. Ch. 429; Stevens v. Cooper, 1 Johns. Ch. 429; Stark. Ev. 660 to 665; 1 Greenleaf's Ev. Sec. 275; Cowen and Hills notes to Phil. Ev. Note, 948;* and see especially *Broughton v. Coffer, 18 Gratt. 184.*

2d. Because the parol agreement would tend to contradict and vary the notes and mortgage given by complainant at the same time as a part of the same transaction.—

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Jones v. Phelps, 5 Mich. 222; Adair v. Adair, Id. 204; Stevens v. Cooper, ubi supra; Cook v. Combs, 39 N. H. 593; Oelricks v. Ford, 23 How. U. S. 49; Crosier v. Acer, 7 Paige, 141; Austin v. Sawyer, 9 Cow. 39, 49; Dix v. Otis, 5 Pick. 38; Powell v. Edmunds, 12 East. 6; Noble v. Bosworth, 19 Pick. 314; Conner v. Coffin, 22 N. H. 542-4; Gregory v. Hart, 7 Wis. 532; Hoyt v. French, 24 N. H. 199; Lang v. Johnson, Id. 302; Hoxie v. Hodges, 1 Oregon, 251; Underwood v. Simonds, 12 Metc. 278; Adams v. Wilson, Id. 138; Richardson v. Comstock, 21 Ark. 69; Oskaloosa College v. Stafford, 14 Iowa, 152; Parsons on Bills and Notes, 501, 503.

And this rule applies as well in equity as at law.—*Wesley v. Thomas, 6 Har. and Johns. 24; Chetwood v. Brittain, 1 Green Ch. 439; King v. Baldwin, 2 Johns. Ch. 557 and 558; Eveleth v. Wilson, 15 Me. 109; Richardson v. Thompson, 1 Humph. 154.*

The cases of compensation for deficiency, relied upon by complainant's counsel, are mainly those arising upon contracts of sale or purchase not yet carried into effect by the execution of the final conveyance and other writings essential to its completion; and where the vendor has filed his bill for the execution of the contract, and the defendant has set up fraud, or mistake in quantity, or the omission in the writing, of terms verbally agreed upon, or a parol variation or discharge (as in *Winch v. Winchester, 1 Vesey & Beames, 375*, and other cases mentioned in *Story's Eq. Jur. Sec. 170*,) or, when the bill has been filed by the purchaser for the execution of the contract, for so much as the vendor is able to convey, or for so much as there is of the land (fraudulently represented by the vendor, and believed by the purchaser to contain more,) and for compensation for the deficiency, as in *Hill v. Buckley, 17 Ves. 395*, upon which complainants' counsel relies. Bills for specific performance in such cases, and defences thereto, stand upon principles so essentially different from those involved in the present case, as to require no comment.

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Belknap v. Sealey, 2 Duer, 570, cited by complainant's counsel, was an action in the nature of a bill in equity, brought by the purchaser to rescind a contract for the purchase of land on the ground of a fraudulent representation of quantity, and sustained on the ground of mutual mistake. One of the express grounds upon which relief was given, as appears by the opinion of Emmett J., was that the contract or sale was yet *in fieri*, and therefore strictly within the equitable powers of the court.

It is true courts have not laid it down as an absolute rule that no relief shall be given for a deficiency, when the contract has been carried into effect by a deed. *Marvin v. Bennett, 26 Wend. 169,* was a bill brought for relief on this ground, after conveyance of the land and mortgage given back; and it was held that the bill could only be sustained on the ground of mistake or fraud, neither of which was established in that case, and the relief was denied.

The court recognized the fact that much stronger and clearer evidence is required of the mistake in such cases, than when the matter rests in contract of sale, and seem to think the evidence must be such as to remove all doubt; and they hold, in that case, that complainant's attention having been distinctly called to the question of quantity, and of a guaranty upon that subject, and having accepted the deed without such guaranty, and executed the notes and mortgage, took the chance of a deficiency or excess, and must be held virtually to have abandoned any claim for deficiency.

In the case now before us, no fraud is imputed to the defendant. The parties dealt with each other upon equal terms. There was no mistake in the execution of the papers intended to be executed. And by accepting the deed, executing the notes and mortgage, and going into possession under the deed, with full knowledge of the contents of all the papers, and the question of deficiency

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present to his mind, and without asking for any written evidence of the supposed parol understanding, we think the whole contract must be conclusively presumed to be embraced in the papers executed. See *Howes v. Barker, 3 Johns. 506; Schermerhorn v. Vanderheyden, 1 Johns. 140; Houghtailing v. Lewis, 10 Johns. 297; Mumford v. McPherson, 1 Johns. 414; Broughton v. Coffer, 18 Gratton, 184.* We think the alleged verbal agreement in this case stands upon no better ground than would a parol reservation of growing crops on the land conveyed.

The decree of the court below must be reversed, with costs, and the bill dismissed.

The other Justices concurred.

Henry Bower v. Thomas Earl.

Conveyances: Construction of description. Where a deed conveys lots in a town and refers to a plat to identify them, and in describing their lines calls the points of compass as designated on the plat by its lines and angles, a correct survey cannot be based upon any other system; and although the lines there delineated are not conformable to the true meridian, the plat, and not the compass, should govern.

Evidence: Statements by grantor in disparagement of title. Where certain statements were made by a prior grantor, while in possession of certain premises, concerning the extent of his holding and the place of the dividing line between him and his neighbor, in a trial of title where a subsequent grantee was a party: *held*, that while they could not prove he actual title, they were competent to explain the nature and extent of said grantor's possession, as being part of the *res gestæ*.

Grant of part of a large tract: Change of possession: Evidence of ownership. When there has been an actual delivery of possession of premises given by a grantor to the grantee, purporting to be for the purpose of carrying the grant into effect, and when such premises delivered are but a portion of a larger tract owned by the grantor, his retention up to a certain line, and his surrender beyond it, indicate that he claimed ownership to that boundary, as the true line of the grant, and denies his grantor's title to all within it.

Change of possession: Occupancy: Adverse possession: Undisputed tenancy. In such case the retention of the part not delivered is a distinct occupancy, and as a possession, stands on the same footing as if held by any other person than the grantor. A right of action would at once arise in favor of the grantee claiming such land against such occupant; and that right, where the latter does

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not in the interval admit it in fact, or by implication of law, would become barred by the lapse of the statutory period of limitation.

Where possession has been thus held for the statutory period, unless it is shown to have been virtually a tenancy undisputed by the tenant at some time in the interval, the bar is complete.

Acquiescence as to possession. The acquiescence which will prevent the running of the statute must be that of the possessor in the owner's claim, and not that of the owner in a possession not acknowledged to be held under him.

Acquiescence which is merely inaction on the part of a claimant, is the very thing which the statute contemplates as creating the limitation which cuts off the right of action.

Heard April 27th. Decided May 4th.

Error to Washtenaw Circuit.

This was an action of ejectment for a strip of land, part of lot No. 8, in the city of Ann Arbor. The entire lot belonged to Edward Munday in 1834, who, July 18, 1842, conveyed to Mulford and Peter Martin a portion of the same, commencing on Main street at the northeast corner of said lot, and running on Main street 21 feet south, thence west to the alley in the rear of said lot, thence north to the north line of said lot, and thence east to the place of beginning. The plaintiff became the owner of this title through several mesne conveyances. The title to the remainder of lot 8 continued in Mundy until his death, and his devisee, by deed dated December 23, 1863, conveyed to the defendant a portion of said lot described as follows: beginning 21 feet south of the northeast corner of lot No. 8, thence south 23½ feet on Main street, thence west parallel with the north line of said lot, 52 feet, thence south 9½ feet, thence west to the west line of said lot; thence north on the west line of said lot 33 feet, thence east to the place of beginning.

The testimony tended to show that before the conveyance to the Martins two stores had been erected on the lot; that the deed to them covered the land on which the north store was situated, and a portion of the premises covered by the south store. That the Martins and their grantees have held possession of the north store ever since the conveyance to them in July, 1842; and Mundy and his

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devisee and grantee have occupied the south store during the whole of that time. The land in dispute in the suit is that portion of the lot which is covered by the deed to the Martins, but which has been ever since occupied by Mundy, his devisee, and Earl the grantee of said devisee.

The defence was based on the continued occupancy by Mundy and his successors.

William C. Voorhees, on the part of the defendant below, stated that he occupied the north store under the Martins, having leased it of Mundy, acting as their agent, although the witness had no knowledge of any authority except that he said he was agent. That while so occupying, he built an addition to the store for the Martins, thirty feet in length, in the rear of the store. The witness was permitted to testify, "Mundy pointed out where to build it, and said that was the line, and that this new wall to be a party wall when an addition should be built to the store now occupied by the defendant."

Witness further testified, under objection, that he claimed and occupied under his deed of the premises, "the store and the land to the alley, the width of the store."

The court charged the jury that if the premises, described in the declaration, passed by the deed from Edward Mundy and wife to Mulford and Peter Martin, and said Mundy and his grantees continued to occupy the same after said conveyance, for the term of twenty years, with the acquiescence of said Martins and their grantees in such occupancy, then such occupancy and acquiescence are a bar to the recovery of the plaintiff in this suit; to which plaintiff excepted. The counsel for plaintiff then requested the court to charge the jury (if adverse possession was relied upon as a defence,) that if the premises in dispute passed by the conveyance from Edward Mundy and wife to Mulford and Peter Martin, and said Edward Mundy remained in possession thereof after the conveyance, such possession would not of itself be adverse to said Mulford

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and Peter Martin or their grantees; which the said court refused, and to which plaintiff excepted.

A verdict was rendered for defendant.

A. Felch, for plaintiff in error.

1. The title to the land could not pass by any parol statement even of the Martins themselves. A deed of conveyance alone could divest the Martins of their title.

a. Such a statement could not operate as an estoppel, because it is not claimed that it was ever acted upon, or that Mundy or his devisee or grantee did anything or suffered anything in consequence of it, or was ignorant of the true line, or was deceived by the other party. *2 Smith's Leading Cases, 745, 748,; 767, 768.*

b. If any effect could be given to these sayings or acts of Mundy, it would be to transfer back to himself as the owner of the adjoining land, by his own utterance of a few words, the title to the land which he had conveyed to the Martins by warranty deed.

c. But even if Mundy had had full authority from the Martins to sell and convey their land or any portion of it, the most solemn deed made to himself under the power, would be invalid. He cannot do by simple parol statement what he could not do by the most formal deed of conveyance.

2. The witness, Voorhes, testified that he purchased the premises then occupied by the plaintiff, Bower. The counsel for the defendant below then asked the witness this question: "What did you claim and occupy under your deed of these premises?

A grantee may occupy less than the entire premises without losing any right in the property. He may be mistaken in the lines of his premises, and both occupy and claim less than he is entitled to, without losing his title to any land that is actually covered by his deed. The title cannot be thus transferred by an owner, nor can

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another person acquire his land in such a case without a deed of conveyance, or such adverse possession as bars the right of the owner.

3. The third error assigned is to the charge of the court in the following words: "If the premises described in the declaration passed by the deed from Edward Mundy and wife to Mulford and Peter Martin, and said Mundy and his grantees continued to occupy the same after said conveyance for the term of twenty years, with the acquiescence of said Martins and their grantees, then such occupancy and acquiescence are a bar to the recovery of the plaintiff in this suit."

Title by occupancy was recognized in the old books, but it existed only in case of a tenancy during the life of another person, and has long since become obsolete.—*2 Washb. on R. Prop. 457.*

Acquiescence in the occupancy of land by another implies consent—a tacit permission to occupy, and precludes the idea of opposition or a holding adverse to the will of the owner or in denial of his title.

Neither occupancy alone, nor occupancy with acquiescence of the owner can give title. The solemnity of a deed of conveyance to pass real estate is not dispensed with by either or both of these.

Where doubt exists in the description contained in a deed or monuments which are lost, the declaration or acquiescence of parties are admissible, not to contradict the deed, but to show where, in truth, lost or uncertain monuments were. But for the purpose of transferring title, a conveyance in writing as required by law cannot be dispensed with.—*Clark v. Withey, 19 Wend. 320; Terry v. Chandler, 16 N. Y. 354; Tolman v. Sparhawk, 5 Metc. 476.*

Even in New York it is held that if the starting point can be found, and the lines accurately run and determined by the courses and distances of the deed, the

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boundaries must be settled by the terms of the deed, and cannot be altered or effected by parol evidence.—*Waugh v. Waugh, 28 N. Y. 94.*

And that it is not competent to establish a new line by parol agreement. —*Vosburgh v. Teator, 32 Id. 561.*

The bar of 20 years recognized by the statute is not given to occupancy and acquiescence, but to a possession of the disputed premises, which, to be available, must be an actual, continued, visible, notorious, distinct and hostile possession.—*2 Smith's Leading Cases, 637, et seq.*

4. The fourth assignment of error is upon the refusal of the judge to charge the jury on the question of adverse possession that "if the premises in dispute passed by the conveyance from Edward Mundy and wife to Mulford and Peter Martin, and said Edward Mundy remained in the possession thereof after the conveyance, such possession would not of itself be adverse to said Mulford and Peter Martin or their grantees."

The correctness of the principle involved in the charge requested, seems to be fully settled by judicial decisions. —*Bloomer v. Henderson, 8 Mich. 395; Dawson v. The Danbury Bank, 15 Id. 489; Jackson v. Burton, 1 Wend. 341; Swart v. Service, 21 Id. 36.*

M. McKernon, for defendant in error.

1. The admission of the witness, Mundy, was offered for the sole and exclusive purpose of showing, first, what was the understanding and intention of the parties to the conveyance made a short time before, and while they were carrying it out in practice. And second, for the purpose of showing what, and how much, Mundy did claim at that time. And, third, for the purpose of showing that the understanding was mutual, and acted upon by both parties at that time, and up to the very commencement of this action. And, fourth, for the purpose

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of rebutting the inferences that might be drawn by the court or jury from the testimony of the surveyor, Professor Wood. This was competent.

The intentions of the parties to a conveyance can always be shown.

So also declarations of persons made while in possession of property, are admissible, and even (as in this case,) long after their decease.—*Pike v. Hays, 15 N. H. 19; Stewart v. Hanson, 35 Maine, 506; Young v. Adams, 14 B. Monroe, 132; Nelson v. Iverson, 17 Alabama, 216; Wooster v. Buller, 13 Conn. 309; 1 Greenleaf on Ev. §§ 109, 110.*

As to the second error assigned, we claim that the ruling of the court below was clearly correct, because:

While we admit that a man may occupy less than he owns, we also insist that his claim, and occupancy of all that he does claim, is very good evidence of the extent of his right, as well as of how the line in question was understood at that time by the parties in question.

It shows that the parties had put their own construction upon these deeds, and had all occupied accordingly.

All such constructions should be respected by courts, unless there is fraud alleged and proven; neither of which was done in this case.

Besides, it proves and establishes the fact, that all the occupants understood and intended that the word "east" was to be taken as meaning east, according to the plat referred to in the deeds, and given in evidence.—*23 Vt. 435.*

3. As to the third error assigned.

Occupancy has at all times been recognized as evidence of ownership, and the acquiescence of others, renders that evidence absolute.

But where the acquiescence and occupation is by adjoining owners in relation to the boundaries of their respective lands, it surely must be conclusive upon them and

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their grantees.—*Brown v. Edson, 23 Verm. 436; Rockwell v. Adams, 6 Wend. 467; Same case, on Error, 16 Id. 286; 2 Hilliard on Real Prop. 345 p. 36, 3d Ed.*

a. This was not a change of title by mere parol, but it was the settlement of a boundary, both by acquiescence and occupation, as well as through the operation of the statute of limitations.

b. It may be claimed that title cannot be acquired by occupation alone, but we insist that the Statute of Limitations of this State requires only occupation to bar a claim of right.—*2 Comp. Laws, 1403.*

4. In relation to the fourth error assigned by the plaintiff's counsel (the refusal of the judge to charge in relation to adverse possession,) we have this to say:

a. There was no such matter of defence set up on the trial, and no such matter appears in the bill, only as it was drawn in by the plaintiff's counsel.

b. And if this matter is to be insisted upon at the argument in this court, we claim that the Statute of Limitations of this State does not recognize the doctrine of adverse possession, and that such a state of affairs cannot arise under it.

c. Again, whatever authorities (if any) may be cited by the learned counsel for the plaintiff, we claim that they are not applicable to this matter, having arisen under statutes that recognize the doctrine of adverse possession, which the statutes of this State do not.

CAMPBELL J.

Bower brought ejectment against Earl, to recover a small gore of land, having a width of six inches in front, on Main street, Ann Arbor, and widening at the rear to three feet. Bower's alleged title was derived by mesne conveyances through William C. Voorhees and William Tibbals, from Mulford Martin and Peter Martin, who purchased of Ed-

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ward Mundy. The description in the deed from Mundy was as follows: "Being all of that portion of village lot number eight, of range number three, and block number one north of Huron street, beginning on Main street, at the northeast corner of said village lot, and running on Main street aforesaid twenty-one feet south; thence west to the alley in the rear of said lot; thence north to the north line of said lot; and thence east to the place of beginning, with the brick store thereon standing." Defendant also claimed by purchase from Mundy's estate of the remainder, or most of the remainder of lot eight. The controversy was whether the gore was covered by the description.

From the testimony of the surveyor who undertook to locate the land on the trial, this gore was made by taking a line due west, and not at right angles with Main street, whereas the defendant claimed that the lines should have been run at right angles, which would have made the description a regular parallelogram, and which would also make it correspond with the building referred to in the deed. The testimony showed that Mundy sold by this description to the Martins, in 1842, and that he and his grantees had retained possession ever since, up to the store line, which defendant claims to be the true boundary. The questions raised on the trial all grew out of matters explaining this possession, or connected with it.

It is quite manifest that some of the difficulties supposed to exist in this case have arisen from the erroneous theory on which the surveyor proceeded; and as the questions of possession are more or less connected with the situation of the lines, we cannot overlook this element in considering the case as presented on the exceptions. The surveyor, after ascertaining in some way what is supposed to be the northeast corner of the lot, assumed that the first course, of twenty-one feet, should run due south, the next one due west. But, having reached the alley, he followed that, although not in a north and south line,

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to the northwest corner of the lot, and did not run the north line, which, if run due east from the northwest corner, would not have reached the place of beginning.

The description in the deed requires the direction which it calls south, to coincide with Main street, and the direction it calls north to coincide with the alley parallel thereto; and the north line of the lot is said to run east from the northwest corner to the northeast corner. The plat, which is admitted by stipulation as genuine, shows that the lines of lot eight run at right angles with Main street, and that the whole system is rectangular. Inasmuch as the deed refers to the plat, and calls the points of the compass in accordance with its lines and angles, no survey could be correctly based on any other system; and if, as seems to be the case, the lines are not true meridian or east and west lines, the plat and not the compass should govern. The legal construction cannot be varied, and the guides which the parties chose to indicate and follow, must not be disregarded in the construction of their deeds.

It is a matter of some doubt whether the admitted facts do not render the whole controversy on the exceptions irrelevant; but as the questions raised may possibly be material on any other dispute of location (although the finding does not seem to leave much else open to controversy), we shall proceed to consider them.

Errors are assigned upon the admission of the declarations of Edward Mundy, and of Voorhees, touching their claims concerning the extent of their ownership. Mundy's statements were made to Voorhees, when the latter was building a store upon their lot for the Martins, and upon that occasion he pointed out where it should be built, and said that was the line, and that the new wall was to be a party wall, when an addition should be built to the store now occupied by defendant. The statement of Voorhees, which was objected to, was, that when

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in possession, he only claimed and occupied the store and the land to the alley the width of the store. These statements were objected to as attempts to create title by parol.

They, certainly, could not be any proof of title. But they were introduced for no such purpose. They were properly received to explain the nature of Mundy's possession, and were receivable on the same principle which allows statements as part of *res gestæ*. They create no right, but simply explain a fact, which is not in itself conclusive of anything, and which derives its legal character from its intent and circumstances. Voorhees' claim while in possession was in disparagement of his own title to the strip in the suit; but we agree with Mr. Greenleaf, that such statements and claims to explain possession are admissible for what they are worth, whether in disparagement of title or not. — *1 Greenl. Ev.* § *109.*

The court charged the jury that if the premises in question passed, by the deed from Mundy to the Martins, and Mundy and his grantees continued after the conveyance to occupy the same for twenty years, with the acquiescence of the Martins and their grantees in such occupancy, then such occupancy and acquiescence would be a bar to recovery in this suit. And the court refused to charge that if Mundy so remained in possession, such possession would not of itself be adverse.

Counsel for plaintiff in error relied upon *Bloomer v. Henderson, 8 Mich. 395*, and *Dawson v. Danbury Bank, 15 Mich. 489*, to show that where a grantor remains in possession after conveyance, he is to be regarded as holding under his grantee, and not by any other claim. Those cases hold that such possession held without change, after a conveyance, is not notice of any other claim as against third persons; but they do not hold that it is incompatible with any other right as against the grantee, if any such right exists, and is not inconsistent

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in fact with the existence of the grant. But where there has been an actual change of possession given by the grantor to the grantee, which purports to be for the purpose of carrying the grant into effect, and where the premises granted are a portion of a larger tract owned by the grantor, his retention up to a certain line, and his surrender beyond it, would naturally indicate that he claimed ownership to that boundary. Where there is an actual change, and the grantee is only admitted within certain lines, the retention of the rest is a distinct occupancy, and, as a possession, stands on the same footing as if held by any other person than the grantor. A right of action would at once arise against the occupant, and that right, where the latter does not in the interval admit it in fact, or by implication of law, would be barred by the lapse of the statutory period of limitation. Where possession has been thus held for that period, it must be shown to have been virtually a tenancy undisputed, at some time in the interval, or the bar is complete. The acquiescence which will prevent the running of the statute, must be that of the possessor in the owner's claim, and not that of the owner in a possession not acknowledged to be held under him. Acquiescence, which is merely inaction, is the very thing which the statute contemplates as creating the limitation which cuts off the right. As in this case, the evidence showed nothing whatever to contradict the claim or holding of Mundy and his grantees, the plaintiff had no right to the charge refused, which was, under the circumstances, an abstract proposition, and of no importance upon the inquiry before the jury.

The judgment should be affirmed, with costs.

The other Justices concurred.

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Samuel E. Peters v. Philip Christa.

Heard and Decided May 4.

Appeal in Chancery, from Wayne Circuit.

The bill in this cause was filed for the purpose of dissolving a partnership, and having an account taken.

It was dismissed on the hearing.

Ward & Palmer, for complainant.

B. T. Prentiss, for defendant.

This case rests entirely upon the facts. The decree of the court below, dismissing the bill of complaint was affirmed, with costs.

Tobias Shurtz v. John Palmer and Another.

Heard April 28. Decided May 4.

Appeal in Chancery, from Branch Circuit.

The bill in this cause was filed for the purpose of declaring a certain deed void, and a decree was granted in favor of complainant, with a modification of the relief prayed for.

H. H. Riley and *Geo. A. Coe*, for complainant.

D. Darwin Hughes, for defendant.

The court, after reviewing the evidence, decided that the decree should be affirmed, with costs.

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Ann L. Ball v. Darius M. Ball.

Appeal, when dismissed: Duty of appellant as to filing return. When a party is in default in filing the return to an appeal, and instead of complying with the rule when his attention is called to his default, resists a motion to dismiss, on technical grounds, the court will not aid him—it being a matter of indulgence on their part, and to be exercised only when the defaulting party complies with the rule, after notice.

Heard and Decided May 6.

Appeal in Chancery, from Jackson Circuit.

Motion to dismiss.

Complainant obtained a divorce in the court below, and defendant, in October last, took an appeal. The return should have been filed before the last January term, but it was not so filed. A motion was then made to dismiss, but was not granted. The motion was renewed at the present term, but failed because the notice of the motion was one day too short. A new notice was then given, and when the motion was called up on Tuesday the defendant, for the first time, produced the return. His excuse for not filing it before was that he was using the record for the purpose of having it printed for use on the argument, but he did not show when he commenced using it for that purpose, nor how much of it had been printed, nor whether any of it had been. He insisted, however, that under the prior decisions of the court, an appeal will not be dismissed, because the return was not made in time, if it is actually made before the motion to dismiss is argued.

J. C. Wood, for the motion.

W. K. Gibson, contra.

Per Curiam: Where the court declines to dismiss an appeal where a party has been in default, it is a matter of indulgence, and it is only done because the party, when his attention is called to the matter by the motion

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to dismiss, has at once filed the return. In this case, the party, instead of filing the return as soon as his attention was called to it, has taken advantage of such technical objections as were open to him to avoid a dismissal, without complying with the practice, and he is therefore not entitled to indulgence. The excuse made is vague and unsatisfactory, and cannot be accepted as sufficient. The motion to dismiss must be granted, with costs.

James Kelly v. John McKenna.

Set off: Pleading and evidence: Instruction of jury by court. Plaintiff below declared upon a special contract for services performed, and also under the common counts.

After introducing evidence tending to prove the special contract he rested, and defendant offered evidence, under his notice of set off, of certain moneys received by plaintiff for him—but which was rejected.

On the conclusion of the testimony, plaintiff withdrew all claim under the common counts.—Jury found for plaintiff.

The rejection of the set off was erroneous. Plaintiff having given evidence pertinent to the issue under the common counts, the proof was admissible when offered, and as the finding was one which might have rested on the common counts, it was the duty of the court to instruct the jury how to distinguish the evidence applicable to the special and common counts respectively, so as to confine their attention to the proof under the special count. This not having been done, it will not be presumed that the error in refusing evidence of the set off was cured by withdrawing the common counts.

Evidence: Copy of letter: Admissions. When a defendant testifying admits that an alleged copy of a letter written by him was substantially correct, it is equivalent to an admission by him, of the fact, and becomes original evidence.

Heard May 8th. Decided May 18th.

Error to Wayne Circuit.

This was an action of assumpsit, brought to recover the value of services rendered upon a vessel.

The declaration set forth the terms of an alleged contract in two special counts. The common counts were also added. The defendant pleaded the general issue, with notice of set off, as follows:

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"Take notice that the following is a bill of particulars of the defendant's set off in this case, to wit:

Spring of 1864—To cash carried to Chicago by plaintiff for defendant, $3,000, out of which the plaintiff kept $100, and never accounted for it - - - -	$100 00
Fall of 1864—To overcharges of the said plaintiff for sailing the Corinthian, as master, during the season of 1864. - - - - - - - - - - -	300 00
To cash received by the plaintiff from the defendant's wife, the same belonging to the defendant, -	120 00
	$520 00"

On the part of the defense, the plaintiff below being called as a witness, was shown a paper purporting to be a copy of a letter written by him to one Bruce, and relating to said vessel; after reading it, he testified that it was a correct copy in its leading points.

The plaintiff's counsel objected to its introduction, on the ground that the original must be produced, and also that the testimony was immaterial. The court rejected it.

Defendant below then offered evidence to sustain his set off. The evidence was rejected, whereupon plaintiff withdrew all claim to recover, under the common counts.

Judgment was rendered for plaintiff.

S. Larned and *F. A. Baker*, for plaintiff in error.

1. The first question raised in this case is whether the court below erred in refusing to allow the defendant to prove a set-off. The plaintiff's declaration contains two special counts in assumpsit, each setting up an express contract and alleging damages generally, for an alleged breach of the same by the defendant. It also contains the general or common counts. The defendant pleaded the general issue, and gave notice of set off; and, at the trial, he sought to prove a demand against the plaintiff, which was the proper subject of a set-off. But it was contended, and the court below held, that the plaintiff's cause of action or

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demand, was itself incapable of being set-off, and that, therefore, under the statute, such a defense could not be made. The precise question, then, to be determined, is whether the plaintiff's cause of action is such that it could be the subject of a set-off. — *2 Comp. L. § 4180, subd. 2.*

The plaintiff declares specially, but it is well settled that the statute of set-off cannot be avoided by declaring specially for that which can be recovered on the common counts. — *Birch v. Depeyster, 4 Camp. 385; Burgess v. Tucker, 5 Johns. 105; Downer v. Eggleston, 15 Wend. 51.*

The plaintiff was entitled to recover on the common counts alone. It is considered a well established rule that, where an agreement has been performed by the plaintiff, and a duty is imposed on the defendant to pay the amount due, in money, a recovery may be had on the general count, although there was a special contract. — *Felton v. Dickinson, 10 Mass. 287; Canal Co. v. Knapp, 9 Peters, 541.*

In the present case, the plaintiff having served a part of the season, and being willing to serve the residue, in contemplation of law may he not be considered to have served the whole? — *Gandell v. Pontigny, 4 Camp. 376; Collins v. Price, 5 Bing. 132; Eardly v. Price, 5 B. & B 333.*

The alleged contract was for the whole season of navigation, and the plaintiff was not guilty of any violation of that agreement, for he did all that the law required him to do. — *Costigan v. M. & H. R. R. Co. 2 Denio, 609; Jones v. Jones, 2 Swan, (Tenn.) 605; King v. Steiren, 44 Penn. St. 99.*

Of course he was bound, when discharged by the defendant, to seek, or at least to accept employment from other parties, and to make the best use of his time. — *Sherman v. Champ. Trans. Co. 31 Vt. 162.*

If the plaintiff, using reasonable diligence, had been unable to obtain employment elsewhere, and had laid out of a situation the balance of the season, he certainly could have recovered the contract price for the whole term.

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So that the term of employment having expired, the contract was fully performed by the plaintiff, and a duty imposed on the defendant to pay the amount due, which could have been ascertained under the common counts of the plaintiff's declaration, the same as in any other case of mutual account between principal and agent.

But admitting that it was necessary for the plaintiff to declare specially for the breach of the alleged contract by the defendant, yet the testimony offered was admissible; for, if the plaintiff had failed to recover on his special counts, then he would have been entitled to a verdict upon the common counts for what the two or three weeks of actual service were reasonably worth.—*Keys v. Stone, 5 Mass. 391; Tuttle v. Mayo, 7 Johns. 132; Linningdale v. Livingstone, 10 Johns. 36; Smith v. Warner, 16 Mich. 396.*

We submit that the Circuit Judge should have admitted the testimony in evidence, and, if requested so to do, to have instructed the jury that if they found for the plaintiff on the common counts to allow the set-off, but that if they found for the plaintiff on the special counts, that then a set-off was not permissible.

2. The copy of the letter of McKenna to Bruce, dated Detroit, May 21, 1866, was material and relevant, and it was competent to introduce the copy.

a. It was material and relevant, because, when taken in connection with the letter of McKenna to Kelley, dated Buffalo, January 17, 1866, it tended to impeach the credibility of the plaintiff.

b. It was competent, because the plaintiff, after reading it, testified that it was a correct copy in its leading points.

Moore & Griffin, for defendant in error.

The first five assignments of error are based upon the theory of the plaintiff's counsel, that he was entitled to a set-off.

The court below was right in excluding testimony upon

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that point. — *Smith v. Warner, 14 Mich. 152; Smith v. Warner, 16 Id. 390.*

It was incompetent to introduce the copy of the letter mentioned in the seventh assignment of error. It was also irrelevant.

The court charged the jury, that if they found that a contract for the season was made, but no price fixed, the plaintiff is entitled to recover, at the rate of such sum as the jury believe, from the evidence, his services were reasonably worth per year, for the time he was out of employment. This was correct. — *Collins v. Vendever, 1 Clark, (Iowa) 573; 1 Pars. on Con. 448; 2 Id. 44, 515; Sykes v. Dixon, 9 Adolph. and E. 693.*

Per Curiam.

In this case, the declaration contained two special counts, and also the common counts. The special counts set up a contract between the parties, for the employment of McKenna by Kelley, as master of a schooner for the season of navigation; that McKenna entered upon the service, and continued about three weeks, when he was dismissed by Kelley, who refused to keep him any longer. Kelley pleaded the general issue, with notice of set-off. On the trial, McKenna, who was the plaintiff below, gave evidence tending to show the contract set up in the special counts; that he entered upon service under the contract, and, at the end of about three weeks, was dismissed by Kelley, who refused to be bound by, or recognize the contract. McKenna having rested his case, Kelley offered evidence of set-off under his notice, but this was excluded by the court, under an objection by McKenna's counsel, that his demand was incapable of being set off, and that, consequently, the set-off proposed by Kelly was inadmissible.

When the testimony on both sides was concluded, the counsel for McKenna withdrew all claims to recover under

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the common counts. The exclusion of the evidence of set-off, when it occurred, was clearly erroneous, and this being so, it is incumbent upon defendant in error to show that it was cured, or rendered harmless by what occurred subsequently. He insists that this is shown by the withdrawal of all claim to recover under the common counts. But we cannot presume that the jury were sufficiently informed, without instructions from the court, to enable them to distinguish the evidence to be applied to the special counts from that which would apply to the common counts, and since the plaintiff below had given evidence which was pertinent to the issue on the common counts, and it does not appear that the Circuit Judge gave the jury any instructions on the subject, but left them at liberty to find a verdict under the common counts, and since the verdict is entirely consistent with the theory that the finding was for the three weeks service under the general count, we cannot assume that the error in refusing Kelly's evidence was corrected or rendered harmless.

The copy of the letter written by McKenna to Bruce should have been admitted. The defendant testified that it was in its leading points a correct copy of a letter he had written to Bruce. This evidence of McKenna converted the contents of the paper as to its leading points into admissions by him, and made them original evidence. It was of no consequence that the paper was a copy of a letter he had written. When he made its contents identical with his declaration, the paper became an original for the purpose of showing his declaration to Bruce; and it was relevant, as it bore upon the state of the accounts between the parties.

There must be a new trial in consequence of the errors which have been stated; but as the other questions raised by the assignment of errors, will not be likely to arise in a future trial, we deem it unnecessary to consider them.

Judgment reversed with costs.

The other Justices concurred.

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Addison P. Cook v. Mary Bell.

Depositions: Objections as to form: Notice. When notice of the filing of a deposition has been given, objections as to form cannot be made at the hearing.—*Circuit Court Rule, 54.* It is only in the absence of such notice, that objection can be made on the trial.

Deposition: Endorsement of return on commission. When the return to a deposition, taken under a commission, was written upon one of the sheets appended by the commissioner, instead of being endorsed upon the commission: *Held*, sufficient. The papers may be considered as a single document consisting of various parts, and as well identified in one way as another.—*2 Comp. L. § 5250.*

Chose in action: Land contract: Assignee. A written contract for the sale of land is such a chose in action as can be sued by the assignee in his own name. The statute reaches every right in property which was ever assignable in equity, or capable of survivorship to executors.—*Comp. L. § 4159; Sess. L. 1863 p. 102; Final v. Backus, p 218.*

Statute of frauds: Contract: Alteration by Parol. Where, under the statute of frauds, a contract would be void unless in writing, such contract when written, cannot be altered by parol.—*Abel v. Munson, p. 306.*

Heard May 8th. Decided May 12th.

Error to Jackson Circuit.

This was an action brought to recover damages for a failure to perform the conditions of a certain contract for the sale of real estate.

Judgment was rendered in favor of plaintiff below.

The facts are stated in the opinion.

G. T. Gridley, and *Jno. D. Conely*, for plaintiff in error.

1. The court erred in admitting parol evidence, tending to show an extension of the time mentioned in the written contract for the payment of the money.—*Comp. Laws*, §§ *3177, 3179*, and cases hereinafter cited.

2. The deposition of Harriet Bell should have been excluded.—*Comp. Laws, Sec. 4250*, 4th subdivision. "The return of the commissioner shall be endorsed on the commission."

In this case the return was endorsed on one of the sheets of the depositions.

3. The court should have charged that if the jury should find that there was a parol agreement for an exten-

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sion of the written contract, the plaintiff cannot recover upon such parol agreement, because the same is not in writing.

a. A contract under seal cannot be varied by parol.—*Littler v. Holland, 3 Term, 590; Blood v. Goodrich, 9 Wend. 68, 73; Delacroix v. Buckley, 13 Id. 71, 78; Allen v. Jaquish, 21 Id. 628; Eddy v. Graves, 23 Id. 82; Sinard v. Patterson, 3 Blackf. 353, 356; Woodruff v. Dobbins, 7 Id. 582; Chapman v. McGrew, 20 Ill. 101, 104; 1 Greenl. Ev. Sec. 302.*

b. A contract required to be in writing by statute of frauds, cannot be proved partly by the writing and partly by parol,—*Goss v. Lord Nugent, 5 B. & A. p. 58, 65; 2 Nev. & Man, 33, 34; Harvey v. Grabham, 5 A. & E. 61, 73; Stead v. Dawber, 10 Id. 57; Marshall v. Lynn, 6 M. & W. 109; Stowell v. Robinson, 32 E. C. L. 386; Hasbrouck v. Tappen, 15 Johns. 200; Blood v. Goodrich, 9 Wend. 68, 73; Espy v. Anderson, 14 Penn. State, 308, 311; Dana v. Hancock, 30 Verm. 616, 618; Emerson v. Slater, 22 How. (U. S.) 28, 41, 42; Hansborough v. Peck, Am. Law Register for December, 1867, p. 79; Eddy v. Graves, 23 Wend. 82; Sugden on Vendors and Purchasers, p. 174, to 180; 2 Phillips Ev. 4th American, from 10th English edition, p. 680, and note, 497.*

c. Extension of time by parol is void.—*Littler v. Holland, 3 Term, 590; Stead v. Dawber, 10 A. & E. 57; Marshall v. Lynn, 6 M. W. 109; Stowell v. Robinson, 32 E. C. L. 928; Hasbrouck v. Tappen, 15 Johns. 200; Blood v. Goodrich, 9 Wend. 68, 73.*

d. So far as any support has been derived from the case of *Cuff v. Penn. 1 M. & S. 21,* for the theory that there can be a valid parol extension of a contract required by the statute of frauds to be in writing, the case is regarded as overruled in England.—*Goss v. Lord Nugent, 5 B. & A. p. 58, 65, 2 Nev. & Man. 33, 34; Harvey v. Grabham, 5 A. & E. 61, 73; Stead & Dawber, 10 Id. 57; Marshall*

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v. Lynn, 6 M. & W. 109; Emmett v. Dewhirst, 3 McN. & G. 587.

c. A substituted performance may often be shown. But its application is limited to cases where the party intending to perform the contract on his part was actually ready and offered to perform, and the other party evaded the performance or refused the money or other things to be tendered, with a declaration, or acts amounting to a declaration, that he did not intend to perform the contract on his part; or elsewhere subsequently to a breach of covenant, the covenantee agreed to accept another thing in satisfaction of his damages, which was an answer for the non-performance of the thing stipulated for. An agreement to accept another thing could not be binding if the new agreement was such as by the statute of frauds required a writing.—*Borden v. Borden, 5 Mass. 67, 69, 74; Frazier v. Cushman, 12 Id. 277, 279; Seymour v. Bennet, 14 Id. 266; Littler v. Holland, 3 Term, 590 and note; Harvey v. Grabham, 5 A. & E. 61, 73; Stead v. Dawber, 10 Id. 57; Marshall v. Lynn, 6 Mees. & Welsby, 109; Stowell v. Robinson, 32 E. C. L. 386; Thompson v. Brown, 7 Taunt. 656; Street v. Dow, Har. Ch. 427; Delacroix v. Buckley, 13 Wend. 71; 1 Greenl. Ev. Sec. 304; 2 Id. Sec. 600, 603; Woodruff v. Dobbins, 7 Blackf. 582; Fleming v. Gilbert, 3 Johns. 530.*

b. A promise to extend the time on a contract makes a new agreement, and should be declared upon, or availed of, by way of defense as such. It is valid if in writing and signed by the party. But, if not in writing and signed by the party to be charged, our statute declares it "void." It has no effect either as a "parol extension," or as a "substituted performance," or as a "parol agreement for a substituted performance." The language of our statute is stronger than that of the English, for there it is "no action shall be maintained," but here, the "contract shall be void."—*Robinson v. Godfrey, 2 Mich. 408, 409, 410; Morgan v. Butterfield, 3 Id. 615, to 624;*

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Penn. Mining Co. v. Brady, 14 Id. 260, 264; Same 16 Id. 332, 338; Comp. Laws, § 3179; Langworthy v. Smith, 2 Wend. 587; Freeman v. Adams, 9 Johns. 115; Phillips v. Rose, 8 Johns. 393; Good v. Cheesman, 2 B. & Ad. 328; Bailey v. Johnson, 9 Cow. 115; Stead v. Dawber, 10 A. & E. 57; Marshall v. Lynn, 6 M. & W. 109; Stowell v. Robinson, 32 E. C. L. 386.

4. The court erred in refusing to charge that the assignment of this contract before breach is not an assignment of a chose in action within the meaning of act No. 75, Laws 1843.—*2 Black. Com. 397, 398; Gillett v. Fairchild, 4 Denio, 82; Laws of 1863, p. 102; Comp. Laws, Sec. 4,159; Bishop Crim. Law, Sec. 428.*

This contract is for the conveyance of land. At the time of the assignment the only right transferred was a right to have the land. The claim for damages did not arise till afterwards.—*Buckmaster v. Eddy, Breese, 381.*

Johnson & Higby, and *Bennett & Bancker*, for defendant in error.

1. If a party to a special contract partially perform on his part, and is prevented by the other from performing the balance, he may abandon the contract and sue and recover for what he has done or paid.—*Hoagland et al. v. Moore, 2 Blackf. 167; Alcorn v. Harmenson, 2 Id. 235; Towers v. Barrett, 1 T. R. 133; Giles et al. v. Edwards, 7 Id. 181; 2 Stark. Ev. 867; Ricks v. Yates, Adm. 5 Ind. 115; Newcastle & Rich. R. R. Co. v. Brumback, 5 Id. 544; 2 Pars. on Cont. 35; Webster v. Enfield, 5 Gillm. 298; Borden v. Borden, 5 Mass. 69.*

Money paid on contract rescinded may be recovered.—*Robb v. Montgomery, 20 Johns. 15; Hudson v. Swift, 20 Id. 24; Raymond et al. v. Remard, 12 Id. 274; Eldridge v. Rowe, 2 Gillm. 92.*

Where one has received money for another which in equity he ought not to retain, the law implies a promise

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to return it.—*Trumbull v. Campbell, 3 Gillm. 502; Beardslee v. Horton, 3 Mich. 560.*

2. The contract declared on in this case, is a chose in action, and the assignee has all the rights of the assignor. —*1 Burr. Law Dict. 213; 2 Kent Com. 351 and notes; 2 2 Bl. Com. 396-7.*

And this suit was properly brought in the name of the assignee.—*Sess. Laws 1863, p. 102; Mann v. Herk. Co. Mut. Ins. Co. 4 Hill, 187.*

3. The time of performance of a contract in writing may be extended by a subsequent parol agreement, even though said contract be within the statute of frauds.

And no new consideration is necessary; or if any, the original contract was sufficient. Or, as in this case, the agreement on the part of Bell to pay interest, or extra interest, was sufficient.—*Wadsworth v. Thompson, 3 Gillm. 423; Keating v. Price, 1 Johns. Cases, 22; Baker v. Whiteside, Breese, (Ill.) 174; Fleming v. Gilbert, 3 Johns. 527; Munro v. Perkins, 9 Pick. 298; 2 Pars. Cont. 574; 2 Abb. Dig. 662, No. 770; 2 Id. 99, No. 886; Langworthy v. Smith, 2 Wend. 590; Borden v. Borden, 5 Mass. 69, 74; Cummings et al. v. Arnold et al. 3 Met. 486; Ten Eyck v. Waterbury, 7 Cow. 50; Erwin v. Saunders, 1 Id. 250; 1 Greenl. Ev. Sec. 304, note 4; Climer v. Hovey, 15 Mich. 24; Woollem v. Hearn, 2 Lead. Cas. in Eq. 651; Stearns v. Hall, 9 Cush. 31, 34; Cuff v. Penn. 1 M. & S. 21; Robinson v. Batcholder, 4 N. H. 40; Buel v. Miller, 4 Id. 196.*

4. There was no error in allowing the deposition of Harriet Bell to be read in evidence. The return of the commissioner was sufficient.—*Pendell v. Coon, 20 N. Y. 134; Hurd v. Pendrigh, 4 Hill, 502.*

CAMPBELL J.

Cook, the plaintiff in error, contracted in writing to sell certain lands to Henry C. Bell, a son of the defendant in error, for a sum of money, payable at fixed times by in-

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stallments, allowing sixty days grace, and providing for the avoidance of the contract, and the right to retain payments made, in case of failure to pay as agreed. The money to make the payments actually made, was advanced to Henry C. Bell by defendant in error, and he assigned the contract to her, and Cook had notice of the assignment. Mary Bell failed to make her payments as provided for, and there was evidence from which the jury were satisfied that a parol agreement was subsequently made to extend the time and make some new terms as to the mode of payment. Before the time as thus extended expired, Cook upon the application of Henry C. Bell conveyed the land to Marietta Bell his wife; and Mary Bell, after causing an application and offer to pay to be made to Cook, brought this action. The jury under the charge, found for the plaintiff below, and Cook brings error upon allegations of misrulings at the trial.

Among other things, a deposition taken under commission was introduced, and the return, instead of being endorsed upon the commission itself, was written upon one of the sheets appended by the commissioner.

Objection was made to its introduction, as not in accordance with the statute. If proper notice was given of the filing, the objection could not be made at the hearing *Rule 54*. It is only where no notice is given that objections of form are permitted on the trial. *Knight v. Emmons, 4 Mich. R. 554*. In this case, it is not alleged that any such notice was given, and it becomes necessary to decide upon the sufficiency of the return.

The Statute (*2 C. L. § 4250*) directs that the Commissioners "shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed." This language is rather ambiguous, and may refer as well to the depositions as to the commission. But we think no reason exists for holding to any technical construction of this direction. If we look to the reason of the thing, there

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would be less danger of substitution of papers, if the return should be upon the documents, instead of on the commission. But we can see no good reason why the papers should not be considered as a single document consisting of various parts, and as well identified in one way as in another. This seems to be the view of the New York Court of Appeals, under the same statute, and we concur in their conclusion.—*Pendell v. Coon, 20 N. Y. 134.*

It was also insisted that the court erred in holding that the contract in question was such a "*chose in action*" as could be sued by the assignee in her own name, under *Section 4159 of the Compiled Laws*, as amended in 1863, *Laws 163, p. 102.* We have no doubt it is within the statute, which reaches every right in property which was ever assignable in equity, or capable of survivorship to executors. As this statute was explained in *Final v. Backus, 18 Mich. R.* decided at the present term, it is not necessary to consider it further.

The principal question, however, arose upon the validity of the parol alteration of the contract. It was an agreement to sell lands, and under the statute of frauds, would have been absolutely void at law, unless in writing, and signed by Cook. No change can be made by parol, which would not, so far as it extended, leave a part of the contract itself in a shape forbidden by the statute. The question was recently settled in *Abell v. Munson, 18 Mich. R.* decided at this term. The court erred in allowing proofs of the parol arrangements.

A question was suggested on the argument, under one of the requests to charge that plaintiff's remedy was only in equity, whether she could in this action recover back upon the common counts for money had and received, the payments made before forfeiture. But the case does not appear to have been presented to the court or jury upon any such hypothesis, and we do not feel at liberty to examine it upon this record. The same difficulty arose in

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Waldo v. Simonson, 18 Mich. R. p. 345, disposed of a few days ago, where the plaintiff below endeavored in this court to rely upon a supposed right of action under the common counts, when the case had been tried entirely on the special counts. As the court here sustained the right of Mrs. Bell to recover upon the special counts, and all the charges were given or refused on that basis, we have no means of knowing what view might have been taken of this point in the court below, nor what proof would have been before the jury concerning the plaintiff's interest in the retained payments.

As the case stood, no occasion had arisen to examine into that subject.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Thomas B. Spencer v. Ebenezer W. Perry.

Bond to pay debts: Official bonds: Penalty: Voluntary payment. The obligor of a bond, conditioned to pay all the debts of a certain firm, paid, before suit, the debts of said firm to the amount of the penal sum.

In a suit upon said bond to recover for the debt in excess of said penalty; *held*,

1. That the rights and obligations of the parties depended wholly upon the bond.

2. That if a party choose voluntarily to perform his obligations to its full legal extent, it is equally as meritorious and effectual as though made through a suit at law.

Such a bond is a private contract, the chief object of which, in including a penalty, was to fix the limit of the liability. The legal effect as to the extent of liability, is that of a covenant, without a penalty, to pay the debts of said firm to the amount of said penalty.

The obligations imposed by official bonds to pay over monies, &c., are not created by the bond, but imposed by law, while the bond is but a collateral security for the performance of a legal obligation.

Heard May 6. Decided May 12.

Case Made after judgment, from Saginaw Circuit.

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SPENCER v. PERRY.

This was an action of debt upon a bond, with penalty of $6,000, conditioned to pay all the debts of a certain firm.

Judgment was rendered for plaintiff.

The facts are stated in the opinion.

Gaye & James, for plaintiff.

This action is upon a bond in the penal sum of six thousand dollars, given by defendant to plaintiff, without sureties.

The condition of the bond recites that the defendant has purchased of plaintiff his right, title and interest in the business of Spencer & Newcombe, and in property described therein.

That part consideration was the payment by defendant of all debts, liabilities and claims of the firm of Spencer & Newcombe, and the condition of the bond is, that the defendant pay, or cause to be paid such debts and liabilities, whether notes, mortgages, contracts, book accounts or otherwise, as and when the same become due and payable, and also save and keep harmless said Spencer therefrom.

The plaintiff maintains his action by showing a debt of said firm unpaid by defendant, and paid by plaintiff.

The defendant sought to avoid the bond by claiming that plaintiff had misrepresented the amount of the debts of Spencer & Newcombe, and that they were much larger in amount than represented, and sought to recoup in damages by reason of such misrepresentation.

The defendant's counsel claimed upon the trial, that if the amount of the debts was misrepresented, the bond could be avoided, and that if defendant had paid debts to the amount of the penalty of the bond, he was thereby discharged from liability.

1. The question raised by the pleadings in this case, viz., that the defendant was entitled to recoup in damages the amount alleged to have been sustained by him by rea-

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son of the fraudulent misrepresentations of plaintiff of the amount of debts and liabilities of Spencer & Newcombe, was a question of fact decided adversely to the defendant by the court below.

2. Misrepresentations as to the liabilities of the firm of Spencer & Newcombe by Spencer, at time of sale, cannot be offered in evidence for the purpose of limiting or qualifying the condition of the bond.—*Dorr v. Munnell, 13 Johns. 430; Stevens v. Judson, 4 Wend. 471; Dale v. Roosevelt, 9 Cow. 309; Huston v. Williams, 3 Blackf. 170; Vrooman v. Phelps, 2 Johns. 177.*

3. The bond in this case cannot be construed as a bond to pay debts and liabilities of the firm of Spencer & Newcombe, to the amount of six thousand dollars only.

4. A bond of this character, viz., to pay money, to wit: the debts of Spencer & Newcombe, and also, to indemnify Spencer against loss, cost, and charges, by reason of the same, can only be satisfied by a full performance of the condition. A voluntary performance of part of the condition will not satisfy the bond.—*2 T. R. 388, (Dunford & East;) 1 Mass. 308; 6 Paige, Chan'y, 88; 3 Caines, 48; Henniker v. Wigg, 45 English Com. Law, 4 Q. B. A. & E. new series; Hancock v. Clay, 3 English Com. Law, 334; 2 Starkie, 68; Potter v. Titcombe, 7 Greenl. 302; Lowe v. Reers, 4 Burr. 2225.*

John J. White, for defendant.

In this case there is but one point for the consideration of this court.

The defendant offered evidence tending to prove that he had voluntarily paid debts spoken of in the bond sued on in this cause, to the amount of the penalty, and claimed as a defense that if such was the fact, the plaintiff could not recover against him; that is, that in no event could the defendant be called upon to pay under the bond in

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question more than the amount of the penalty. This evidence was excluded by the court. The judge ruled that, no matter if he had paid such debts, unless he had paid all the debts spoken of in the condition of the bond, whether $5,000 or $50,000, the plaintiff could recover the amounts of all such debts paid by the plaintiff.

If the defendant had from the first refused to pay any of the debts, and had paid none, and the plaintiff, the day after giving the bond, had been obliged to commence the payment, and had then commenced suit, he would, under our statutes — *Comp. L. pp. 1221 & 1222 § 4509-4517*—have taken judgment in form for the penalty. For all subsequent breaches, he must have proceeded under the same statute; could have had no further judgment; and the sum of all recoveries against defendant could not have exceeded the penalty of the bond. — *Fraser v. Little, 13 Mich. 195; Lyon v. Clark, 8 N. Y. 154, and cases cited.*

But, the court say, voluntary payments are very different. Although the contract is the same; although the amount of the penalty is the same; although you have in good faith paid twice or thrice the amount of the penalty without suit, yet you have not in a single particular performed any part of the condition of your bond, and we will compel you to pay the full amount of the penalty, if there are so many debts left to be paid.

If this is law, parties giving bonds will be pretty sure to refuse to perform such contracts, and thus by judgment of court in the first instance, ascertain and fix a limit to the extent of their liability, because after a suit on the bond for the penalty, there can be no other suit.

The court should have considered such evidence, and given judgment for defendant, if defendant had paid debts to the amount of the penalty.

The case of sheriff's bond has no similarity — because all persons can sue on it — but no one can recover more

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than the penalty. The statute gives parties other remedies, and not any rule of the common law.

Voluntary payments to amount of the penalty in an indemnity bond, is a full and complete satisfaction of it.—*Clark v. Bush, 3 Cow. 151; Approved 8 N. Y. 4 Seld. 154,* and in *18 N. Y.* and in *13 Mich.*

The parties must be supposed to have known the amount of indemnity wanted and given, and have fixed the limit, by amount of penalty.

CHRISTIANCY J.

This was an action of debt upon a bond, with a penalty of six thousand dollars, conditioned for the payment, by defendant, of all the debts of the late firm of Spencer & Newcombe, and to indemnify the plaintiff, one of said firm, against such debts. The declaration was in the usual form, demanding the penalty of the bond. The plaintiff's right of action, and the defendant's obligation to pay, rested wholly upon the bond.

After the execution of the bond, and before the bringing of the action, the defendant had paid debts of the firm to an amount exceeding the six thousand dollars—the penalty in the bond.

It is admitted that if the defendant had paid nothing upon the debts of the firm, and suit had been brought upon the bond, the amount of recovery would had been limited to the amount of the penalty. See *Comp. Laws,* §§ *4509–4517.*

But it is insisted that a voluntary payment, without suit, of any amount of the debts mentioned in the condition, though exceeding the penalty, is no satisfaction of the bond. If this be so, it will certainly be for the interest of all obligors in such bonds, to pay nothing until compelled by suit. But we see no intelligible ground for any distinction in such cases between a voluntary and a compulsory payment.

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If a party choose voluntarily to perform his obligation to the full extent that the law could enforce it, we are at a loss to perceive, why the payment should not be recognized as equally meritorious and effectual, as if made at the end of a law suit. See *Clark v. Bush, 3 Cow. 151; Lyon v. Clark, 8 N. Y. 154,* and cases there cited. The law is not so tenacious of its prerogatives as to prevent parties from performing their obligations of their own accord, without the compulsion of legal process.

We need express no opinion here upon official bonds, or those of executors, administrators, guardians, &c., which are regulated by special provisions of statute. But it is easy to see that these all stand upon grounds very different from the bond in this case, or ordinary bonds *inter partes.* The obligation of officers, executors, &c., to pay over and account for money coming into their hands by virtue of their office, is not created by the bond, but imposed by the law; and the bond is but a collateral security for the performance of a legal obligation not dependent upon the bond. In paying over and accounting for moneys, therefore, as required by law, the officer, executor, &c., is only performing a duty imposed upon him by the law, independent of the bond. No amount of payments, therefore, will prevent a recovery to the full extent of the penalty in case of a default to that amount. In other words the bond applies only to the sum or sums for which the party is in default, and not to sums which may have been paid over in the performance of official or legal obligation, not created by the bond.

The present bond was a contract between private parties, and one chief object of putting it in the form of a bond with a penalty, must, according to the general understanding in such cases, be supposed to have been to fix the limit beyond which the liability of the defendant should not extend. Another object may have been to enable the obligee to enforce it, by action of debt, instead of covenant.

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The legal effect of the bond, as to the extent of liability, does not differ from that of a covenant, without a penalty, to pay the debts of the firm to an amount not exceeding six thousand dollars. If the parties had intended to provide for a liability to an indefinite extent, to be limited only by the amount of the debts of the firm, whatever they might be; the obvious mode of creating such a liability was by a covenant to that effect without a penalty, or by making the penalty of the bond so large as, in any event, to exceed the debts, as the parties probably supposed they had done here.

We express no opinion whether bonds conditioned for the performance of continuous acts or duties, such as for the support of another for life, or a certain number of years, or bonds for the performance of other acts than the payment of money, or indemnity against its payment, would fall within the rule here laid down. These and perhaps other particular species of bonds may be found to stand upon a different principle.

The judgment of the Circuit Court must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

The People ex rel. Joseph Workman v. The Board of Education of Detroit.

Right of attending School: City of Detroit. An amendment to the general School Law in 1867, Session laws 1867, vol. 1, p. 42, provided that "all residents of any district shall have an equal right to attend any school therein, provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when expedient."

Held, that the provisions of the law of 1867, were of universal application to all the school districts of the state, and that there was no intention on the part of the legislature to make an exception of the city of Detroit.

City of Detroit: Colored children. The city of Detroit is not entirely exempted from the operation of the General School Laws, but is subject to such of their provisions as are not inconsistent with the special legislation regulating the city schools.

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THE PEOPLE v. THE BOARD OF EDUCATION OF DETROIT.

Held, further, that under this law colored children were placed on the same footing with white children, and admissible on the same terms to all schools.

Mandamus: Public Schools: Right of parent to the writ. In an application for *mandamus* to compel the admission of a minor child to the public schools, though the proceeding is for the benefit of the child, the father is entitled to assert the right.

Mandamus: Petition. When the petitioner failed to shew affirmatively, that the child possessed the necessary qualification; but offered to submit him to the rules and regulations of the board, and was refused on account of his color: *Held*, that the board having made this the sole objection, the relator, should this fail, is presumptively entitled to the writ.

Heard May 5. Decided May 18.

Mandamus to the Board of Education of the City of Detroit.

It appeared that in April, 1868, the relator duly and properly applied for the admission of his child, a mulatto, of more than one-fourth African blood, into the Duffield Union or Tenth Ward School of the city of Detroit, and was refused.

That, at the time of said application, there was room for relator's child in said school; that at the present time there is room for scholars in said school; that the relator is a mulatto, residing and owning property in the city of Detroit, and paying taxes thereon, including a tax for the support of the primary schools of said city; that said city for many years heretofore has constituted one school district, under the direction and regulation of the Board of Education; that the respondents, many years since, established separate public schools for colored children exclusively, but in all other respects the same as the public schools for the white children, and that there are now two of said schools in operation in said city, one in the fourth and one in the seventh ward thereof, and that another is now being prepared in the sixth ward thereof; that relator's child is not entitled to enter any other grade of school than that to which these colored schools belong; that out of all the colored children in said city, but thirty-eight live in wards distantly removed from said colored school; that there are now vacant sittings in said colored schools to which the relator's

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child can be admitted upon proper application; that after the establishment of said colored schools, respondents made a resolution or by-law, requiring all colored children to attend said colored schools, and prohibiting their admission into the white schools of said city; that the regulation and government of the public schools of said city has been for many years past eminently successful, and the behavior of the scholars therein exceedingly conducive to the advantage and prosperity of said schools; that there is a strong prejudice against the colored people among a large majority of the white population of said city, and among many of the children in said schools, and that a careful consideration of the question has convinced respondents that the abolition of said colored schools, and the indiscriminate union and mingling of colored with white children in all the public schools, would be greatly prejudicial to the best interests of said public schools, and would engender strife and discord among the scholars thereof.

H. M. & W. E. Cheever, for relator.

The Board of Education of the city are a body corporate, created by special statute, and take the place of the Board of School Inspectors under the general law of the state. To them is committed the direction and regulation of the free schools of the city. The act was passed in 1842, and although various amendments have from time to time been made to it in other particulars, the provisions bearing upon the present case are unchanged. Section one, of the act of 1842, provided that "the city of Detroit shall be considered as one school district, and hereafter all schools organized therein, in pursuance of this act, shall, under the direction and regulations of the board of education, be public and free to all children residing within the limits thereof, between the age of five and seventeen years, inclusive."—*Act of 1842*, § 1.

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The act of 1869, now in force, changes this section only in the admission of scholars up to the age of twenty. — *Act of 1869, § 1.*

The only ground upon which the respondents base their refusal to comply with the requirements of section one of the act is to be found, if it exists, in section nine of the old Act of 1842, as amended in 1850 and 1855, and which is section eight of the Act of 1869. This section gave them "full power and authority to make by-laws and ordinances relative to the regulation of schools, and relative to anything that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same." — *Act of 1842, p. 114, § 9; Act of 1869, § 8.*

This seems to give a general discretionary power, it is true, and respondents may claim great latitude in the exercise of their powers under it, still they can do nothing which will conflict with the provisions of the act as a whole; they can do nothing which would be manifestly contrary to the intention of the legislature in the enactment as a whole. This intention clearly was to commit the care and custody of the free schools of the city of Detroit to the respondents, instead of a board of school inspectors (as elsewhere in the state), to be by them carried on as nearly as possible in accordance with the general state law, not to be "regulated" in such a way as to be virtually closed against one class of citizens, while open to others. What then, is the meaning of section nine?

(The counsel here entered into a critical examination of the several acts of the legislature, together with the constitutional provisions bearing upon the subject.)

Without section nine, it will not be contended that colored children could be excluded from the nearest school to their homes in the city. Does this section give the respondents the power they claim under it?

This section will be claimed by the respondents as in

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the nature of a general authority to legislate upon this question. But granting this, for the argument, their legislation or regulations upon a subject committed to them, must be in conformity, as far as practicable, with the general legislation of the state upon the same subject matter. — *Welch v. Stowell, 2 Doug. 336.*

The object in making the city "one district," was to give the control of all the schools to one corporate body.

By the law of the state, children must attend in the district where they reside. As the city increased, this became inconvenient. A scholar might live across the street from a school-house, and yet be in another district. Hence the necessity of creating one district, and giving the board power to make school "limits" of territory contiguous to the school-house, without regard to ward lines.

A "regulation" requiring children to go from the tenth ward to the ninth, a distance of over two miles, and pass other schools on their way, becomes virtually a prohibition of the benefits of the school system.

Again the Duffield school has its grades; the colored school is a primary school only; and the exclusion of the the colored child from the union school is an absolute prohibition of an enjoyment of the higher grades of the free schools.

The power to regulate is not the power to prohibit. — *Nagle v. the City of Augusta, 5 Geo. 546; Ex Parte Burnet, 30 Ala. 461; Roberts v. City of Boston, 5 Cush. 198; Clark v. Board of Directors, 24 Iowa, 60: People v. Auditor General, 17 Mich. 175.*

Applying the reasoning in said opinions to this case, the power to regulate should not be confounded with the power to create or change a system as previously fixed by the legislature, both in the general school law of the state, and in the act applicable to this city.

The primary intention of the act is to give free schools to all children in the city, If the construction, contended

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for by the respondents, of section eight, be given, does it not, to a certain extent, prevent the schools being free to all?

D. B. & H. M. Duffield, for respondents.

Respondents insist that the relator is not entitled to the *mandamus* prayed, for the following reasons.

1. Because it is at this time impossible for the respondents to comply with it on account of the lack of room in the schools. — *Regina v. The London & N. W. R. W. Co. 6 Eng. R. & C. Cases, 479.*

2. Because the relator has no such interest in the matter as entitles him to ask for a *mandamus.*

The petition should be made by the child excluded, by its next friend. — *Stephenson v. Hall, 14 Barb. 222; Sherman v. Charlestown, 8 Cush. 161; Donahoe v. Richards, 38 Maine, 376.*

3. Because the resolution of respondents requiring colored children to attend separate schools, established and maintained exclusively for them, is —

First — Authorized by statute;

Second — An exercise of their discretion, with which this court will not interfere; and,

Third — A reasonable regulation "for the good government and prosperity of the free schools of said city."

a. This authority is derived from the Act of February 1869, which in express terms repeals all other acts inconsistent therewith.

Section one of said act provides:

"That the city of Detroit shall be considered as one school district, and all schools now organized, and hereafter to be organized therein in pursuance of this act, shall, under the direction and regulations of the board of education, be public and free to all children residing within the limits thereof, etc.

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Section eight, gives the said board "full power and authority to make by-laws and ordinances * * * * relative to the regulations of schools, * * * relative to anything whatever that may advance the interests of education, the good government and prosperity of free schools in said city, and the welfare of the public concerning the same."

The resolution of respondents relative to colored schools merely regulates the admission of children to the several schools.

There has been no exclusion of relator's child from the public schools of said city. The return expressly avers that the relator's child can, at any time, upon proper application, be admitted to the colored schools.

The meaning of the act clearly is, that all the city schools shall be public and free to all children living in said city, and that the board of education shall regulate the apportionment and distribution of said children among the several schools of the city.

This power to regulate the system of classification and distribution of the school children must be placed somewhere outside the scholars. The legislature have wisely committed it to respondents, who are citizens of Detroit, and elected by its people, and when it is reasonably exercised by them, we submit their decision must be conclusive.

b. The regulation of the system of distribution and classification of children is a deliberative and discretionary act. The jurisdiction of the board is a large and populous city, comprehending many conflicting and antagonistic elements. They are the best judges, and are and should be the sole judges of what is the best method of harmonizing and directing these elements so that they will not clash.—*4 Mich. 104.*

They are, also, a deliberative body, and all their actions and resolves are the result of deliberation, and involve an exercise of their discretion.

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There is no specific direction how the schools shall be organized, or how they shall be taught, or how many schools there shall be kept, or what shall be the qualifications for admission to the schools. All these matters must be regulated by respondents; and in the regulation thereof they do not act ministerially, but exercise the discretion vested in them by law.

It is well settled that in such a case a *mandamus* will not be granted. — *Moses on Mandamus, p. 78; Spears v. Cummings, 23 Pick. 227; People v. Auditor General, 3 Mich. 427.*

c. The exclusion of the colored children from the white schools, is a reasonable regulation "for the good government and prosperity of the free schools of said city."

Under the authority of *Day v. Owen* cited *infra,* we think that this question must be left to a jury.

This regulation is no more unreasonable than one requiring all girls to attend certain schools, and all boys to attend certain others, and this court would not issue a writ commanding respondents to admit a girl to a boy's school, if respondents should in their judgment separate the sexes.

Can it be said to be unreasonable for respondents to separate colored from white children in the public schools as long as stated? *Comp. L. p. 950,* § *3209,* forbids intermarriage between them.

The fact is averred and admitted that there exists among a large majority of the white population of Detroit a strong prejudice, or animosity, against colored people, which is largely transmitted to the children in the schools, and that this feeling would engender quarrels and contention if colored children were admitted to the white schools.

Whether the association together of black and white children in the same schools would not equally foster and engender this prejudice may well be doubted, and as said by Chief Justice *Shaw,* in *Roberts v. Boston,* cited *infra,* is

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a fair and proper question for the board of education to consider and decide, having in view the best interests of both classes of children placed under their charge.

The following authorities are analogous. They are actions against carriers for refusing to transport colored persons in the same apartments of their conveyances which the whites use. They hold that the carrier is bound to carry a colored person, but that they have authority to regulate their accommodation, and if they afford them equal accommodations with the whites, then it is a question for the jury whether the regulation is reasonable.—*Day v. Owen, 5 Mich. 520; Jacobs v. Atlantic Nav. Co. cited from N. Y. World of March 11, 1869;* Pennsylvania case referred to in above case, of *Jacobs v. A. N. Co.*

The only authority directly bearing upon this question which we have been able to find, is—*Roberts v. Boston, 5 Cush. 198.*

We submit that both upon principle and authority the *mandamus* should be denied.

COOLEY CH. J.

Under the general law of the state, entitled "Of primary schools," the several townships are divided by the township boards of school inspectors into districts, each of which is a corporation, with officers chosen by its members, and with large powers in the establishment and control of schools, the management and disposition of school moneys, and the levying and collection of taxes. These districts generally have a single school house only, and they need only the simple machinery prescribed by the general law for the proper performance of their corporate functions. For the larger towns of the state, it has been deemed necessary to make special regulations; and general and special laws have been passed under which most of the cities and large villages of the state have been made union school districts,

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with larger boards for the management of their affairs, larger powers of taxation, and peculiar powers in the grading of the one school, or the several schools which they may establish. In so far as the laws creating these districts establish special regulations for them, or confer special or enlarged powers, they are removed from the control of the general primary school law; but in all other particulars that law still controls, and as school districts they make their reports and receive their primary school moneys under it.

The city of Detroit is one of the towns provided for by special legislation. By an act "relative to free schools in the city of Detroit," passed in 1842, (*S. L. 1842, p. 112*) it was provided that "the city of Detroit shall be considered as one school district," and the control of all schools organized therein was put under the direction and regulations of the board of education therein provided for. Previous to this act, there had been within the city the anomaly of a district within a district; the former including only the colored population; but this was inconsistent with the free school act and was therefore repealed by implication. The free school act has been modified subsequently, and in the present year has been revised throughout; but the city is still declared to be one school district, in the same language we have quoted from the original act.

Such being the division of the state into school districts, the legislature of 1867 passed an act amendatory of the primary school law, one section of which is as follows: "All residents of any district shall have an equal right to attend any school therein: Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient." (*S. L. 1867, vol. 1, p. 43.*)

It cannot be seriously urged that with this provision in force, the school board of any district which is subject to

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it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established.

Does this provision apply to the city of Detroit? That city, as we have seen, is expressly declared to be "one school district," and is, therefore, within the words of the act of 1867. That the legislature seriously intended their declaration of equal right in the schools to be partial in its operation, is hardly probable. But they may, nevertheless, have failed to make it universal, if they have incorporated it in a law from the operation of which some portion of the state is exempted by other laws.

The declaration is incorporated in the general primary school law. I am not aware that there is any organized portion of the state that does not come under some of the provisions of that law. The specially created union school districts are subject to it, except so far as the special legislation creating or governing them is inconsistent. The declaration in the Detroit free school act that the city shall constitute one school district, is idle for any other purpose than to connect the city with the primary school system which the general law establishes, and to give its citizens the advantages, and to require of its officers the performance of such duties as are essential to the harmonious working of the general system within the city. That was undoubtedly its purpose. It is not true, therefore, that the primary school law has no application in the city of Detroit, or that we can say of any of its provisions respecting districts that Detroit is exempt from them, unless we are able to see how those provisions are inconsistent with the free school act, or with any other special legislation that may have established peculiar regulations for that city.

Many things in the free school act clearly refer to the

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general law, and require its aid to give them effect. The primary school money and district library money are apportioned under it, and are only received by the city in its capacity of a school district. The free school act provides for reports, but it is the general law which prescribes to what office they shall be sent, and gives the state superintendent a supervisory and directory power in respect to them. The free school act empowers the city board of education to make by-laws and ordinances relative to the taking of a census of children, but this is controlled by the general law which provides that children in almshouses, prisons or asylums, not otherwise residents of the district, and not attending the school, shall not be included in such census, nor shall Indian children be included, unless they attend the school, or their parents are liable to pay taxes in the district. — (*S. L. 1867, vol. 1, p. 43.*) The penalty which the general law imposes on any one who shall wilfully disturb any district or union school, (*Ibid.*) will protect the schools in Detroit, as well as those in the country. At every point the general law is complementary to the special legislation, and is necessary to give it complete operation. Even the tax which may be levied by the city board for school purposes, is graduated by the number of children within the district, as shown by the report made under the general law. And as all other portions of that law not inconsistent with the free school act, apply to the city of Detroit, so must the section establishing equality of right in the schools apply also, unless it can be shown to be inconsistent. No inconsistency was pointed out on the argument, nor was any reason suggested as likely to have influenced the legislature to make that city an exception.

It is true that the board of education are vested with large powers to make rules and regulations respecting the schools, and the attendance of pupils therein, but this fact alone is not sufficient to show a legislative intention that

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they shall be exempted from general regulations like that in question. A general statute regarding graded and high schools empowers the trustees "to classify and grade the scholars in such district, and cause them to be taught in such schools or departments as they may deem expedient; to establish in said district a high school, when ordered by a vote of the district at any annual meeting, and to determine the qualifications for admission to such schools," "and to make such rules and regulations as they may think needful for the government of the schools," (*Sess. L. 1859, p. 447.*) No broader powers than these are conferred upon the Detroit board to make rules and regulations respecting attendance upon schools; and any rule of construction which will confirm to that board the power they claim, will give it also to every board of trustees of a graded or union school district under this law. Yet if we were to look outside the act of 1867 for the occasion of its passage, we should probably find that occasion to exist only in the city of Detroit and in some two or three of the union or graded districts where distinctions based upon color were kept up, which were unknown in the other portions of the state. We might perhaps take notice of the fact that immediately preceding the passage of that act, an application was made to this court for a *mandamus* to compel the trustees of one of the union school districts, embracing the city of Jackson, to admit a colored pupil to the same school with white children, notwithstanding they had established a colored school within the district.

If that application was not the immediate occasion of the legislation in question, it is at least highly probable, that it presented one of the cases which made new legislation appear important; and if the act was not intended to reach the districts which are empowered to make their own regulations, then we shall witness the remarkable spectacle of a law which assumes to prohibit what the

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legislature evidently regard as an unjust discrimination, but which is so framed as to reach only those portions of the state where the distinction does not exist, and to exclude from its operation those portions where the legislature is notified that it prevails.

In one particular the section in question is undoubtedly modified in its operation within the city of Detroit, and within every other school district of the state which lawfully establishes more than one school for pupils of the same grade. The fixing of school limits in such case, and the establishment of regulations which shall require children residing within those limits to attend the schools therein, are within the contemplation of the statutes, creating or authorizing the creation of the districts, and are therefore, lawful and proper. But we do not discover that there is anything in any of those statutes—and we include particularly in this statement, the Detroit free school act—that overrules or modifies the requirement of the general law, that the right to attend the schools shall be possessed equally and impartially by all classes of residents.

The conclusion is inevitable, that the legislature designed the impartial rule they established to be of universal application.

It remains to be seen whether there are any formal objections to the writ prayed for. It was suggested by the respondents, that the father, as such, could not apply for a *mandamus* on behalf of his infant child, but that the child should apply by *guardian ad litem*. The father is the natural guardian of the child, charged with his nurture and education, and having a personal duty to perform in respect thereto. Although the proceeding is for the benefit of the child, the duty of placing him in school is the parent's, and the father is entitled on his own behalf to appeal to the courts for the removal of any unlawful impediments. It was also urged, that the application for the writ did not

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show affirmatively, that the child possessed the necessary qualifications for admission to the school. It shows, however, that the father applied for his admission, and offered to submit him to all the rules, examinations and regulations of the board with regard thereto, and was refused because of the child's color. The board having made this the sole objection, the relator, if this fails, is presumptively entitled to the writ. We think, under the statute, the objection is not valid.

As the statute of 1867 is found to be applicable to the case, it does not become important to consider what would otherwise have been the law.

CHRISTIANCY and GRAVES J J. concurred.

CAMPBELL, J.

The claim of the relator in this case is, that the Board of Education of Detroit cannot lawfully maintain the separate schools for colored children, which have ever since its organization been maintained, and are now kept up in the city, and require them to attend there.

If there is any ground of complaint, the relator is the proper person to bring the case before the court. No one can be more interested than the father of a child in obtaining his school privileges.

The question involved is purely one of law, and cannot properly be allowed to become involved in any complications of policy. If the board of education have the control over the arrangement and classification of the schools, which they have heretofore exercised, their action cannot be judicially revised. If they have exceeded their powers, the excess can be restrained, and the writ applied for is the proper process.

The counsel for relator did not claim upon the argument, that the law of 1867 was applicable to city schools, and we have not, therefore, had the benefit of any full dis-

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cussion upon the relation which the city system bears to the general legislation, concerning schools in the ordinary districts, so far as it is affected by this statute.

It seems to me that section 28 of the statute of 1867 is foreign to the inquiry. It is inserted in the middle of that part of the primary school law which relates entirely to the organization of the ordinary districts, and the powers and duties of their officers. The fact that it purports to be an amendment of a section that has not been in existence since 1859, might perhaps bear upon its validity; but it is inserted where it naturally belongs, and while going far enough to prevent discrimination in attendance in the general districts, it was needed for other purposes as well, in those districts. As to them, it covered ground upon which there was no clear legislation; while as to the Detroit schools, the whole subject had been either provided for by legislation, or expressly put in the control of the board. The application to this court for a *mandamus* to admit a colored child to a school in an interior city, had disclosed to the legislature the remarkable fact, that the rights of attendance on district schools had been left almost entirely to depend upon implications which, while possibly within reasonably plain bounds in many respects, had nevertheless given rise to honest doubts and difficulties. In Detroit the school ages were within narrower limits than the census ages, and on the other hand, the schools were all absolutely free to those within those ages, and the classification and arrangement were left entirely to the board, who were bound to do what they could for every one. The absence of some positive provision raised other difficulties than those relating to colored children, and to age and residence. There was one clause giving non-resident tax-payers, who had no schools at home, the right to send their children into districts where they were taxed, which has tended to make some confusion in the popular mind, touching the relative rights of others.

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The arguments which have been urged in this case in this court, as well as propounded elsewhere, upon the rights of tax-payers in the schools, might very well have contributed to the propriety of making some more explicit declaration, for no rule of exclusion could be more odious ,and none less likely to be sanctioned, than one which should operate against those, who, from poverty, were most in need of public aid, and in whose training and elevation the community are interested as future voters and citizens. There was for many reasons a necessity for some legislation to prevent these doubts, and confer absolute rights on all children. There was no such necessity in Detroit, for provision had been already made for all children, and the board of education had been entrusted with plenary legislative power, in contriving means and regulations so far as their funds would permit, for best arranging how this should be made effectual. They could do all that the legislature could do in making by-laws and ordinances concerning "anything whatever that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same."

Upon every usual rule of construction, this 28th section should not be made applicable to any special system where there had been already legislation covering the ground, even if the Detroit school law had in some other respects been dependent on the primary school law. But there is not, so far as I have been able to discover, a single provision of that law from beginning to end, relating to schools and their regulations, which has any such applicability. Even in regard to the school census, the board makes its own by-laws, and deals with none but county and State officers. This census has nothing to do with the regulation of schools, and is not based on attendance, or used in them at all, as a guide to determine who are admissible. It is made to facilitate the distribution of school moneys

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derived from the state under the constitution, and of library penalties which belong to towns and cities, except where smaller districts have been allowed for library purposes. These provisions are in no way connected with the management of district school matters, and would be quite as appropriate in any other part of the statutes. But as before stated, the Detroit school law puts the board in direct communication with the county authorities, and regulates their rights and doings very differently from those in the other districts. The suggestion that they are connected with the primary school law by the provisions of section 31, as amended, concerning the punishment of disturbances in public schools, does not appear to me to sustain the connection. That section was originally confined to district meetings, and the amendment was only passed in the same statute with section 28, in 1867. If the Detroit schools were not previously organized under the primary school law, neither of these sections could have any tendency to bring them under it. They must both be regarded as applying to schools under the statute of which they are amendments, and can have no wider scope. The Detroit schools could certainly exist without a provision which was not thought of for more than thirty years after the whole State system had been flourishing, and the board of education has power to pass ordinances on the same subject, and the Recorder's Court has jurisdiction to punish their violation. *School Charter, Secs. 8 and 9.* The offence was also a misdemeanor at common law, according to the best authorities.—*1 Bish. C. L. § 982.*

If it should be suggested that it cannot be presumed different provisions would be permitted among different children in different places, it cannot be denied that these differences have been expressly created by law. Until 1869, the school ages were different in and out of the city. When the census was on the basis of a range of ages from four to eighteen, the city schools were confined by law to the ages between five and seventeen. Since the

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change was made, in the state at large, to the term between five and twenty, the old city rule remained unchanged until the present year, when it was made to correspond. The origin of the Detroit school system was had under the very discrimination of color which is now complained of. When the charter was revised and consolidated during the past winter, if the rule giving control to the board had been deemed improper, it would have been rescinded. No one can read the charter, in comparison with the general laws, without seeing that the legislature deemed it wiser to leave a very broad discretion in the board, over the various complications and difficulties incident to a heterogeneous city population, than to require such action as might not be easily undone, should the schools suffer from it. They have given the board a power of local legislation on many school matters entirely exempt from the control of the civil government of the city, and have made them substantially independent of the council in pecuniary matters; one of the last things in which such bodies are usually entrusted with discretionary powers. It cannot be claimed, that the legislature could not make or authorize any regulation they should see fit, in regard to the management of different scholars, and it would be impossible to employ language delegating a larger discretion than they have given to this board.

We cannot avoid seeing, and counsel very frankly admitted, that the force of the relator's claim depends much, if not entirely, upon the effect to be given to a changed condition of public affairs, and whatever corresponding change that condition may have wrought upon public opinion concerning the treatment of colored persons. How far the regulations complained of arose out of any less favorable opinion is not very clear. It is claimed that the rule now enforced is founded on very different considerations, and that the original act of 1841, which first required the separation, was meant to be beneficial, and not invidi-

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ous. And I have no doubt such was the fact, although the supposed necessity arose from the state of public sentiment. But whether the policy was, or is, one worthy to be maintained now, is only to be determined by the board, or by the legislature. Public opinion cannot have the force of law, until it is expressed in the forms of law. Courts may or may not appreciate it, but they cannot determine the law by what that opinion is, or by what they suppose it to be. And that the law, which is in this regard unchanged, did originally allow—if it did not require—separate colored schools to be maintained, has never been seriously doubted. In 1841, when the city contained several districts, the inspectors of the city were required to organize a district having no metes and bounds, but composed of all the colored children in the city, within the school ages, and schools were to be kept up separately for their benefit in the city at large. In 1842 the city was made a single district for all purposes; the inspectors were incorporated into a single board, succeeding to the property and liabilities of all the former districts, and given plenary power over the entire management of the schools. The powers given were the same as mentioned in the now existing laws, which are substantial re-enactments. The policy indicated by the legislature of 1841 has been adhered to, and three colored schools have been erected, and are now maintained, in no respect, as the return shows, differing from, or inferior to the other schools. If the law of 1867 repealed any of the former provisions, it might be said that the re-enactment of 1869 restored it; for that is the last enactment. But if the law of 1867 was, as I conceive it to have been, entirely inapplicable, then it had no force one way or the other, and the board of education must act on their own judgment and responsibility in determining how long they should adhere to their present policy; and any change must depend upon their decision.

I think there is no case made for relief.

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Joseph Porritt v. Elizabeth Porritt.

Divorce: Desertion: Separation. The separation required to constitute the offense under the law respecting divorce, must be, and continue to be, for the period named, a voluntary breaking off of matrimonial cohabitation by one party against the will of the other, and under circumstances which the law does not consider sufficient to justify it.

Where for more than one year of the three and a half years of separation of the parties, the defendant was awaiting trial upon a charge made against her by the now complainant of an attempt to take his life by poison; and when during the *whole* period of separation, except ten days, a suit for divorce on complaint of the now defendant was pending upon charges of cruelty and habitual drunkenness of the now complainant, and in which the circuit court made a decree divorcing the parties which this court reversed, but upon grounds in no wise impugn the good faith of that application:

Held, that this separation of the present defendant from her husband under such circumstances, affords no ground for a divorce.

Heard May 6th. Decided May 18th.

Appeal in Chancery, from Wayne Circuit.

The bill in this cause was filed by complainant below, to obtain a divorce from defendant on the ground of desertion.

The case was heard on the pleadings and proofs, and the bill was dismissed.

The facts are stated in the opinion.

Ward & Palmer, for complainant.

The complainant seeks a divorce on the ground of desertion by the defendant. She left the complainant on the 24th day of August, 1864, and on the 27th day of the same month commenced proceedings for a divorce from the bonds of matrimony. This court held that she left the defendant without justifiable cause, and denied the prayer of his bill.—*16 Mich. p. 140.*

Her desertion continued from the time she left the complainant till the 28th day of October, 1867, when he filed the bill in this suit.

The defendant, in her answer, alleges the same matters in defense of her desertion, that she set forth in her bill as grounds for a divorce, and adds to the same, that be-

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fore she left the complainant, he accused her of attempting to poison him, and afterwards prosecuted her on the charge, and that on the trial of the same she was acquitted.

All the other matters set forth in the answer, even if this, which might have been litigated, could be excepted out, except the prosecution on the charge of poisoning, were passed upon in the previous suit, and found against her, and cannot now be again controverted by her, or made available in her defense in this cause.

The position then in which the defendant stands is this: She left the complainant for none of the causes for which a divorce may be granted, and by that act was guilty of desertion.—*Butler v. Butler, 1 Parsons, Penn. 329; Grove's Appeal, 1 Wright, 443, 447; Cattison v. Cattison, 10 Harris, Pa. 275; Eshback v. Eshback, 11 Id. 343; Vanleer v. Vanleer, 1 Id. 211; Bishop on Marriage and Divorce, vol. 1, §569–799.*

And nothing occurred subsequently to break the continuity of the desertion.

E. C. Hinsdale, for defendant.

The complainant in his bill of complaint alleges that the defendant, his wife, has deserted him, and asks a divorce solely on this ground.

This desertion is denied by the answer, but this admits that a separation took place between the parties on the twenty-fourth day of August, A. D. 1864, and that the parties have not since lived together.

The evidence further shows that on the 27th day of August, A. D., 1864, the present defendant filed her bill of complaint against the present complainant for a divorce on other grounds; that the prayer of said bill was granted by the Circuit Court for the county of Wayne, in Chancery, but on appeal the decree of said Circuit Court was reversed, and said bill was dismissed October 21, 1867.

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The bill in this case was filed on the 28th day of October, A. D. 1867, or just one week after the former suit ended.

1. Upon the above state of facts, we insist that the present bill cannot be maintained.

Desertion, as used in divorce law, is "the voluntary separation of one of the married parties from the other, or he voluntary refusal to renew a suspended cohabitation, without justification, either by the consent or wrongful conduct of the other."—*1 Bishop on Marriage and Divorce, § 776.*

It involves the ceasing to cohabit, the intent to desert, and the want of justification.

In this case there was no "intent to desert." This cannot be inferred from the mere fact of separation.—*Ibid. § 784.*

The defendant left the complainant under the belief that she had a good ground for a divorce from him, and immediately after the separation, she, in entire good faith, filed her bill for the purpose of obtaining a divorce. During the time of the pendency of that suit, cohabitation between the parties would have been highly improper, and therefore that time can form no part of the statutory period.—*1 Bishop on Marriage and Divorce, §§ 801, 802; Marsh v. Marsh, 14 N. J. (1 McCarter,) 315; Doyle v. Doyle, 26 Mis. 549.*

2. The complainant's cruel conduct towards the defendant subsequent to the commencement of the former suit, effectually prevented any reconciliation between them, and was of itself a good cause for her remaining separated from her husband.

In September, 1864, he instituted criminal proceedings against her, in which he accused her of attempting to poison him. On this charge she was tried in September, 1865, and acquitted.

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During the pendency of this criminal suit, her separation from him was justifiable, and, from his conduct, his consent to such separation may be inferred. The year which elapsed between the commencement and end of this suit cannot, therefore, form a part of the statutory period.

After the acquittal of the defendant upon the criminal charge, the complainant cruelly persisted in his accusation of her criminality at different times and in the presence of different persons.

These accusations are acts of cruelty which would justify the defendant in separating from the complainant, even if there had been no suit for divorce pending.–*Gillinwater v. Gillinwater, 28 Mis. 60; Marker v. Marker, 11 N. J. 266; Hardin v. Hardin, 17 Ala. 250; Rutlidge, v. Rutlidge, 55 Sneed, (Tenn.) 55; Kimball v. Kimball, 13 N. H. 224.*

The decree of the Circuit Court dismissing the complainant's bill should be affirmed.

GRAVES J.

This is a bill filed by the husband against the wife for a divorce, on the ground of desertion.

The suit was commenced on the 28th day of October, 1867, and it is alleged by the bill that the defendant deserted complainant on the 24th day of August, 1864, and has ever since lived separate and apart from him, and refused to live with him. The defendant by her answer admits that she separated from complainant on the 24th of August, 1864, and has ever since lived apart from him; but she denies the desertion stated in the bill. She insists that he was habitually drunk, and often very violent and abusive to her, and that his language and behavior, was so offensive and cruel, as to cause her to leave him at the time mentioned. She also alleges that shortly after she left the complainant, he caused her to be arrested on a false charge made by him that she had attempted to take

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his life by means of poison, and that she was subsequently tried upon said charge in the Circuit Court and acquitted.

In the sense of our law respecting divorce, desertion implies a voluntary breaking off of matrimonial cohabitation by one party against the will of the other for the full period of two years, and under circumstances which the law does not consider sufficient to justify it. The separation required to constitute the offence, must continue to be marked by the characteristics here indicated for the whole statutory period, and not merely for the hour, day or week when the breach occurs, or for any other space of time less than two years.

It appears that the separation in this case had continued for a little more than three years and two months, when the husband filed his bill, and the evidence makes a strong impression upon our minds that at no time during the whole period, the complainant was averse to the separation. But the record also discloses, that from the fore part of September, 1864, until the 30th of September, 1865, when she was tried and acquitted, the defendant was under a legal charge preferred by complainant of an attempt to take his life by poison, and was for that period of over a year awaiting trial. During that time, she could not have been required with justice to cohabit with her husband, and her refusal to do so was justified by the circumstances.

It would be a strange and most dangerous perversion of the statute which makes the crime of desertion a ground of divorce, to adjudge a wife held for trial for a year or two at the instance of the husband for an indictable offense, to have been guilty of desertion while thus held, though innocent of the other offense. A doctrine of that kind would convert the separation caused by the charge preferred by the husband into a crime in her against the matrimonial rights of the husband, and to be followed by a divorce based upon it.

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The law is not so inconsistent as to pay off in that manner the wrongful accusation and enforced separation with the deeper injury of a divorce grounded upon it.

There is, however, another circumstance connected with this case, which requires to be considered.

It is shown that the present defendant on the 27th of August, 1864, being three days only after the separation occurred, filed her bill in the court below against the present complainant for a divorce, on the alleged ground of cruelty and habitual drunkenness on the part of the husband, and that, notwithstanding an earnest defense by the latter, the wife obtained a decree on the 10th of January, 1867, but which was reversed in this court on the 28th of October, 1867, upon reasons which admitted the habitual drunkenness of the present complainant.—*16 Mich. R. 140.* The pendency of that suit from its institution, until the reversal of the decree in this court, embraced the whole period of the separation relied on in this bill, except about ten days. It is also seen that the decree of the Circuit Court divorcing the present defendant was actually standing unreversed for more than nine months of that time.

There is no ground for contending that the former bill was not filed in good faith; and any supposition that it lacked the elements of a real case worthy of judicial investigation, is repelled by the opinion expressed by this court, and the circumstance that the court below thought the case as made by the wife, sufficiently meritorious to justify a decree as prayed by the bill.

Some of the proceedings incident or belonging to divorce cases, mark the sense of the law on the subject of cohabitation during the suit. Where the circumstances of the wife demand it, the court is authorized to require the husband, according to his ability, to support the wife separately while the suit is going on, and we cannot suppose that this would be so, if the separation were deemed by the law to be wrongful.

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Then it is well settled, that collusion of the parties will be fatal to the suit, and uninterrupted cohabitation would usually be a sign of [collusion, when it did not tend to show conjugal forgiveness, which, if shown in time and proper form, would be equally fatal to the case.

But apart from considerations of this description, we are of opinion that it was eminently wise and proper for the parties to keep separate during the pendency of the former suit, and that it would have been wholly incompatible with any just conception of the nature of that suit, and an offense against social propriety, if not a sufficient and deserved answer to the application, for the wife to have voluntarily cohabited with her husband, after having stated a case to establish its impropriety, and on which she asked the court to set its seal of approbation by a decree.

Without pausing to dilate upon the manifest impropriety of holding that a failure or refusal to cohabit during the nine months, when the decree of divorce made by the Circuit Court was standing, should be deemed nine months of desertion, we are satisfied that the separation of these parties during the pendency of the first suit was a proper and justifiable separation, and not in any just sense imputable to the wife, as a continued voluntary breach of matrimonial cohabitation against the will of the husband; and we are also satisfied, that, independently of this consideration, the complainant has failed to show an intentional separation of the defendant from him, and against his will, for the term of two years as claimed by the bill. As we think the decree of the court below, dismissing the bill, was correct, it must be affirmed, with costs.

The other Justices concurred.

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The Great Western Railway Co. v. Walter H. Hawkins et al.

Common carriers: Suitable cars: Declaration: Subordinate officers. Where the contract of a railroad company to transport certain horses, was silent as to the fitness of the cars to be furnished: *Held*, in an action for damages, that the company were responsible under their common law liability, though limiting the common law liability in some particulars, for injuries resulting from defective cars.

The obligations of the carrier to furnish suitable cars, fit for a particular purpose, is absolute, without reference to the fitness or fidelity of agents or officers, subordinate or otherwise, unless plaintiff, with notice of the defect, assented to their use.

Heard May 5. *Decided May* 12.

Error to Wayne Circuit.

This was an action brought to recover damages of the Great Western Railway Co. for alleged injuries to certain horses while being transported over their road.

The following is a copy of the declaration:

"For that the said defendant, before and at the time of the delivery of the goods and chattels to said defendant as hereinafter next mentioned, was, and from thence hitherto hath been and now is, a common carrier of goods and chattels for hire, to-wit: from Paris, in the province of Canada, to the city of Detroit, in the United States of America, and as such common carrier the said plaintiffs, on or about the 5th day of May, A. D. 1865, at Paris, aforesaid, caused to be delivered to said defendant, and the said defendant then and there accepted, and received of and from the said plaintiff certain goods and chattels of said plaintiffs, to-wit: nineteen horses of great value, to-wit: of the value of $4,000, to be safely and securely carried and conveyed by the said defendant, from Paris, aforesaid, to Detroit, aforesaid, and there, to-wit: at Detroit, aforesaid, safely and securely to be delivered to said plaintiffs, for certain reasonable reward paid to said defendant in that behalf; and it then and there became and was the duty of said

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defendant to take due and proper care of said goods and chattels, and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid; yet the said defendant, not regarding its duty in that behalf, but contriving and intending to injure said plaintiffs, afterwards, to-wit: on the day and year last aforesaid, and while said goods and chattels were in its possession, and under its control, took so little and such bad and improper care of said goods and chattels, and so carelessly and negligently behaved and conducted itself in and about the carriage and conveyance of the same, and delivery thereof as aforesaid, that said horses, by means of such carelessness and negligence, and bad and improper care, were greatly gored, lacerated, bruised, and otherwise injured and damaged. to-wit: on the day and year aforesaid, and while in the custody of defendant, as aforesaid.

And whereas, also, afterwards, to-wit: on the day and year aforesaid, from Paris to Detroit, aforesaid, the said defendant, as such common carrier as aforesaid, for certain hire and reasonable reward, thereafter to be paid to said defendant, had the care and custody of certain horses of said plaintiffs of great value, to-wit: of the value of $4,000, yet the said defendant so negligently, carelessly, and improperly behaved and conducted itself in taking care of said horses, that by reason of the carelessness and improper conduct of said defendant in that behalf, the said horses then and there became and were greatly hurt, wounded, and otherwise injured, by means of which said premises, as set forth in first and last counts, said plaintiffs have suffered damages to a large amount, to-wit: to the amount of $1,000, and therefore they bring suit, etc."

Defendant pleaded the general issue.

At the close of the plaintiff's testimony, the defendant introduced a shipping bill, partly written and partly printed, signed by plaintiffs, and which was read in evidence, for the purpose of showing a special contract.

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On the back of which, there was printed words and figures as follows, to-wit:

1. "The owner of the within mentioned animals undertakes all risk of loss, injury, damage, and other contingencies, in loading, unloading, conveyance, and otherwise, whether arising from the negligence, default, or misconduct, gross, or culpable, or otherwise, on the part of the railway company's servants, agents, or officers.

2. The railway company do not undertake to forward the animals by any particular train, or at any specified hour; neither are they responsible for the delivery of the animals within any certain time, or for any particular market.

3. When free passes are given to persons in charge of animals, or to their owners, or to the consignees named on the way bills, or either of them, it is only on the express condition that the railway company are not responsible for any negligence, default or misconduct, gross, culpable, or otherwise, on the part of the company or their servants, or of any other person or persons whomsoever, causing, or tending to cause, the death, injury, or detention of persons with such free passes, or of such animals, and that whether such passes are used in traveling by any regular passenger train, or by any other train whatever."

The above was signed by the owner as follows: "I agree to the above conditions."

Passes were also delivered to plaintiffs below, with conditions endorsed similar to the above.

Counsel for the defendant then offered evidence tending to show an examination of the cars before the shipping of said horses, and proper care on part of defendants, both in the shipping and transporting of said stock.

Counsel for defendant then rested his case.

Counsel for plaintiffs then gave evidence tending to show that the examination of the cars was on a previous

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occasion, that the shipping bill and passes were not signed until after the horses were loaded in the cars.

Counsel for plaintiffs then asked the court to instruct the jury:

1. That the defendant, having undertaken to transport horses over its road, was bound to furnish suitable and proper carriages for that purpose, and are liable if the cars provided were unfit for the purposes to which applied.

2. That if the injury to the animals occurred through defective carriages, the defendant is not exempted from liability by the terms of the alleged contract.

Which instructions were given.

The counsel for the defendant then asked and requested the court to charge and instruct the jury:

1. That the declaration was against the defendant on its common law liability as a carrier.

Which charge was given.

2. That it was proven and not disputed that in this case there was a special contract for the transportation of the horses, the plaintiff cannot recover upon the present declaration.

3. That the defendant could, by contract, exempt itself from all negligence upon the part of its agents and servants, and such contract is valid, unless it is shown that the company itself was negligent, by proving knowledge of the use of defective cars, or showing the employment of unfit or unsuitable agents.

4. If the company had no notice of the use of defective cars, and did employ suitable and competent agents, whose duty it was to examine and see that the cars for such freight were in sound and suitable condition, the defendant is not, under the contract in evidence, liable for injuries resulting from the negligence of such agents or servants."

And which three last requests were refused.

The jury rendered a verdict for plaintiff.

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Gray & Moran, and *E. W. Meddaugh*, for plaintiff in error:

This case was before this court in *17 Mich. p. 68.*

The court then held that the special contract between the parties did not exonerate the company from furnishing safe and suitable cars, &c.

The case has been again tried, and a verdict was given in favor of the plaintiffs below.

New questions are now presented, which were not raised upon the previous hearing.

1. The declaration was general against the campany as common carriers. There was no allegation that the company failed in the duty of furnishing safe and proper carriages. Under the decision of this court, it might be their duty to do so, but for a recovery there should be a special count. *Shaw v. Railroad, 13 Queen's Bench, 352; 13 Iredell, 518; Kimball v. Rut. & Bur. R. R. Co. 24 Vt. 247; Austin v. Manchester R. R. Co. 5 Eng. L & Eq. 329; Bissell v. N. Y. Cent. R. R. Co. 25 N. Y. 442; 4 Selden, 375; 24 N. Y. 281, 222; Shaw v. T. & North Midland R. R. Co. 66 Common Law, 345.*

2. While the special contract might not excuse negligence on the part of the company, or its chief officers, it might well protect them from the negligence of subordinate agents, if the company, by its chief officers, had no knowledge of the use of defective cars, and employed proper agents, &c.

Moore & Griffin, for defendants in error.

1. We claim that both questions now presented were indirectly, if not directly passed upon by this court, in the former decision of this cause. — *Hawkins v. Great Western R. W. Co. 17 Mich, 57.*

The case of *Shaw v. The York & North Midland Railway Co.* was cited by counsel, and alluded to in the opinion of the court, but this court did not adopt the decision so far as the question of pleading is concerned.

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If this declaration is similar to the one in that case, and that case be law, the position of counsel for plaintiff in error is well taken.

But we say: That the contract, unless alleged or proven, by plaintiff, is matter of defence.

The evidence went only to one point, the insufficiency of the carriages.

The contract was entirely immaterial; it did not affect the negligence proven.

There was no objection to the introduction of the evidence tending to prove the defect in cars.

Is there any sound reason why such evidence as to negligence should not be applied to the second count, charging negligence in taking care of the horses, while in care and custody of the plaintiff.

2. Defective carriages involve the negligence of the principal, and not of the agent merely.

There is an implied warranty that a carrier undertaking to furnish vehicles for a certain purpose will provide suitable ones. — *Lyons v. Mells, 5 East, 428; M'Manus v. The Lancashire & Yorkshire Railway Co. 4 Hurl. & Nor. 327.*

CHRISTIANCY J.

The first point raised by the plaintiff in error (the question of the sufficiency of the declaration to warrant a recovery on the ground of the defectiveness of the cars furnished by the company, without declaring specially upon the contract, &c.) was involved, and must be considered as decided in this case when before us, upon the same declaration, in *17 Mich. 57*: For though the point was not raised, and could not, as the case was then presented, have been assigned for error—the case having been brought here by the plaintiffs below, to reverse the judgment for a charge adverse to them—yet if the objection now taken be well founded in law, the plaintiffs in that case could not

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legally have been injured by the charge, since they could not have recovered under their declaration, whatever the charge upon the points to which it related might have been; and the judgment should not, therefore, have been reversed.

The company in this case must be regarded as common carriers, and liable as such, except so far as that liability was qualified by the special contract. The contract was silent as to the fitness of the cars to be furnished by the company. As properly held in the case when formerly before us, the contract did not exempt the company from the duty or obligation to furnish suitable cars; but the common law liability as to this point, and to this extent, remained substantially the same as if no special contract had been made. The reception of the property for transportation, whether under the special contract, or as carriers of such property generally, created the same liabilities in this respect, and the company must be considered as common carriers in reference to this particular duty, for the breach of which alone the recovery was had.

2. The evidence in the case tends to show that the injury to the horses occurred in the course of their transportation, and in consequence of the cars being unfit for the purpose. The wrong or negligence, therefore, in this respect, may properly enough be alleged as a breach of the duty to carry safely. We are aware, there are some cases of this kind, which have required a more special mode of pleading; as under the modern system of pleading in England, which requires more precision in stating the exact nature of the breach of duty, than under the former common law rules. But we see no beneficial purpose to be subserved by a more specific form of declaration.

We think the declaration is sufficient to admit the proof of the negligence or breach of duty which the evidence tended to prove.

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The second point raised by the plaintiff in error is, "that while the special contract might not excuse negligence on the part of the company or its chief officers, it might well protect them from the negligence of subordinate agents of the company if its chief officers had no knowledge of the use of defective cars, and employed proper agents," &c.

We must regard this point also, as fully and correctly settled in the case as formerly decided, and no longer open to controversy. The obligation of the company to furnish suitable cars under or notwithstanding this contract, was then held to be absolute on reception of the property, without reference to the fitness or fidelity of agents or officers, subordinate or otherwise, unless some showing was made, that the plaintiffs, with proper opportunities of observation, and with notice of their actual condition, assented to the use of the cars on which their horses were shipped. We see no reason to doubt the correctness of this decision, and think it fully covers the point now raised.

There is no error in the record. The judgment of the Circuit Court must be affirmed, with costs.

The other Justices concurred.

William Case v. John G. Erwin.

Action for breach of covenant against incumbrances: Wife's premises: Notice of husband's contract: Implied consent: Notice to purchaser of existing equities. On the 15th of September, 1854, Ralph Eley became patentee of a quarter section of land, embracing the premises in question, and on the 2d of October, 1855, united with his wife, Mary Eley, in a conveyance of the quarter to one Armenius Eley, who, on the next day, conveyed to said Mary Eley. The deed to Armenius Eley was recorded some thirteen days after its execution, but his deed to Mary Eley was not recorded till the 21st of November, 1859. Shortly after the deed to Mary Eley, and before December, 1855, Ralph Eley established his residence on the quarter, occupied it, erected buildings on it, and deported himself as the owner of the land. Under these circumstances, and while this state of things continued, Ralph Eley in June, 1856, entered into a written

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agreement with defendant and one Catlin, providing that they should erect a steam saw-mill on the land, and that on its completion the former should convey the same to them.

The mill was erected according to the agreement, Mary Eley being fully aware of the existence of the agreement, of its provisions, and of such performance by defendant and Catlin, and neither suggesting any claims on her part or intimating any objection to what was going on or proposed. Shortly after the completion of the mill, and when by the terms of the agreement for its erection, defendant and Catlin had become entitled to a conveyance, Ralph Eley and Catlin fixed upon an arrangement which was never consummated, whereby the former was to have Catlin's half of the premises, and before this arrangement fell through, as it subsequently did, Mary Eley and her husband Ralph, conveyed the other undivided half to defendant and afterwards, and on the 25th of July, 1857, they mortgaged their interest in the property to one Goodrich, and stated in the mortgage that the mill was owned by the the mortgagors and "Catlin and Erwin." About July, 1860, by a decree in chancery against Ralph and Mary Eley designed to enforce the equitable rights of Catlin and Erwin under their contract for the erection of the mill, it was adjudged that the property in question belonged to the latter, and about the same time Erwin acquired Catlin's interest. On the 14th of January, 1861, Erwin conveyed the mill premises to the plaintiff in this suit, by deed containing the usual covenant of warranty and against incumbrances.

The Goodrich mortgage was foreclosed against Ralph and Mary Eley alone, and on May 24, 1861, the title resulting from the foreclosure became vested in one Jennings. Case having entered under his deed from Erwin held exclusive possession until September, 1861, when Jennings claiming under the mortgage title, went in without process, and claimed an undivided half of the premises. Case requested Erwin to protect him against this claim of Jennings which was refused, whereupon he purchased the Jennings claim and instituted this suit on the covenant in the deed against incumbrances.

Held, 1st, that Mrs. Eley, as the holder of the legal title, was not at liberty to assert any right against the equitable claim of Catlin and Erwin to a conveyance, and that both herself and husband were bound, on the completion of the mill and at the time of the Goodrich mortgage, to convey the premises pursuant to the mill contract.

2nd. That whatever interest Ralph Eley and wife still possessed was subject to the equities of Catlin and Erwin, and that this interest when conveyed by the mortgage was equally subject to such equities.

3rd. That the mortgage bore upon its face enough to indicate that Catlin and Erwin had some rights in or to the property, and also to indicate that whatever was conveyed by it, and whether subordinate or not to these rights, was to be ascertained by inquiry: that Goodrich, the mortgagee, was therefore chargeable with notice of the equities of Catlin and Erwin and bound by them, and that Jennings who held only under the mortgage was in the like position.

Held, further, that the establishment of the legal title in Catlin and Erwin by the decree in chancery on the foot of their equitable right ensured to them as against the mortgage as of the time when they became entitled to a conveyance under their contract; and the mortgage as an incumbrance, and subject to their equities, was altogether cut off.

Heard May 5th. Decided May 12th.

Case Made from Wayne Circuit.

This action was brought to recover damages for a breach of a covenant against incumbrances contained in a deed given by defendant to plaintiff.

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Judgment was given for the defendant.

The facts are stated in the opinion.

Ward & Palmer, for plaintiffs.

Courts of equity do not compel persons to perform contracts to which they are not parties, and especially women, to convey their lands to carry out the agreements of their husbands.—*Weed v. Terry, 2 Doug. Mich. 344; Story's Eq. Juris. § 732.*

But if the agreement with Catlin and Erwin were such, that a court of equity would compel a specific performance of it, it does not follow that Goodrich would have been affected by it.

His mortgage was first recorded, and must have preference over their claim, unless they can show that he had such knowledge of it, as to make it fraudulent for him to accept a mortgage on it as against their claim.—*Greenleaf's Cruise on Real Prop. B. 4 p. 458-9; Goodfrey v. Disbrow, Walker, Ch. Mich. 260; Boggs v. Varnum, 6 Watts and Serg. 469; Mechan v. Griffin, 3 Pick. 149; Jackson v. Valkenburgh, 8 Cow. 260; Jackson v. Elston, 12 Johns. 452; Lawrence v. Tucker, 7 Greenl. 195; Dey v. Dunham, 2 Johns. Ch. 182; Norcross v. Widgery, 2 Mass. 509; Jackson v. Given, 8 Johns. 137; Fork v. Burch, 6 Barb. Sup. Ct. 60; 4 Kent's Comm. p. 171--2; Willard's Eq. Jur. 251--2--3--608.*

It is not insisted that Goodrich had any notice of Catlin & Erwin's claim, unless the phraseology of his mortgage was such notice, or sufficient to put him on inquiry.

The mortgage describes the parcel of land in these words: "Their interest in a steam saw mill and the appurtenances, situate, &c. and the piece or parcel of land on which the same stands, and described, etc. * * the aforesaid mill being owned by said party of the first part, and Catlin & Erwin, of Detroit."

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Catlin & Erwin had taken from Ralph and Mary E. Eley conveyances of an undivided half of the premises, and put them on record, and had thus defined and given notice of their claim in the land, and a purchaser was not bound to inquire further.—*Bloomer v. Henderson, 8 Mich. Plummer v. Robertson, 6 Serg. & Rawle, 179.*

The conveyance to Goodrich was in effect a quit claim and release, which our statute provides "shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale."

It will not be disputed that under a deed of bargain and sale, a good faith purchaser would have taken an undivided half of the mill premises; and the effect of this conveyance, under the provision of our statute, must be the same.—*2 Comp. L. § 2722; McConnell v. Reed, 4 Scam. (Ill.) 117.*

At common law, a quit claim and release only operated on any interest the grantor might actually have in the premises released, at the time of the conveyance, and such a view of the law might, perhaps, justify the decision in about the only cause holding a doctrine adverse to the position we have taken.—*Adams v. Caddy, 18 Pick. 463.*

At best, Catlin & Erwin were only entitled to a mortgage on the premises, and if it was allowed to take precedence of the mortgage executed to Goodrich, Goodrich's mortgage would still have been an incumbrance on the land, and the purchaser under it could have held the land and redeemed it from Catlin & Erwin's claim, or until his claim was divested by the foreclosure and sale under the mortgage, to which they would have been entitled, and under such a state of facts, the plaintiff would still be entitled to his damages.

S. T. Douglass, & S. D. Miller, for defendants.

This action is brought by Case against Irwin, to re-

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cover damages for breach of a covenant against incumbrances contained in a conveyance by Irwin to Case, of about fifteen acres of land, with a saw mill thereon, situated in Gratiot county. The conveyance was executed January 14, 1861.

The only question in the case is, whether, when this conveyance was executed, a certain mortgage, executed by Ralph and Mary Eley to one Goodrich, in July, 1857, was a valid incumbrance upon an undivided half of the premises.

The mortgage conveyed certain land specifically described, "and also their interest" (the interest of the grantors) "in a steam saw mill and appurtenances, situated in the town and county aforesaid, and the piece or parcel of land on which it stood, and described as follows," etc. "the aforesaid mill being owned by the said party of the first part, and Catlin & Irwin of Detroit."

1. As the mortgage purported to convey only the interest of the mortgagors without stating what that interest was, the mortgagee took only such legal title as the grantors had, subject to all subsisting equities in favor of third persons.—*Farrar v. Patton, 20 Mis. 81; Brown v. Jackson, 3 Wheat. 449; Adams v. Cuddy, 13 Pick. 463; Sweet v. Brown, 12 Metc. 175; McConnell v. Reed, 5 Ill. 117; Mills v. Shepard, 30 Conn. 98.*

2. As against the mortgagors, Catlin & Irwin were the equitable owners of the entire mill property when the mortgage was executed. They had become entitled to a conveyance of it as against Ralph Eley by building the mill in pursuance of the contract of purchase of June, 1856. And Mary Eley, in whom thel egal title appears to have been vested, by allowing her husband to deal with the property as his own, and by standing by, and with full knowledge of what was being done, suffering Catlin & Irwin to build the mill upon it without objection, is estopped from con-

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troverting their rights under the agreement of June, 1856. —*Dunn v. Cudney, 13 Mich. 239.*

3. Goodrich was chargeable with notice of all the rights of Catlin & Irwin. The mortgage on its face showed that C. & I. had some interest in the property, without describing the extent of it. He was bound to inquire what that interest was.

GRAVES, J.

This is an action to recover damages upon the covenant against incumbrances, contained in a deed given by the defendant to the plaintiff.

The material facts are as follows:

On the 15th of September, 1854, Ralph Eley became patentee of the north half of the north-east quarter of section three, town eleven north, range three west, in Gratiot county. On the 2d of October, 1855, the patentee and Mary Eley his wife, united in a warranty deed of the same land to Armenius Eley, which deed was recorded on the 15th of the same month, and on the 3d of said month, the last named grantee, Armenius Eley, conveyed the premises to the before mentioned Mary E. Eley; but this grant remained unrecorded until the 21st of November, 1859.

Shortly after these conveyances in the fall of 1855, which had for their object the vesting of the title in Mrs. Eley and prior to December, 1855, her husband, the said Ralph Eley, took up his residence on said land, having erected thereon several buildings shortly before.

While the title was in this state, and while Ralph Eley was in the actual possession of the premises, and conducting himself as the owner, the defendant and one Catlin in June, 1856, entered into a written contract with Ralph Eley, which provided that defendant and Catlin should erect a steam saw mill on the land, and that when completed, Ralph Eley should convey the same to them.

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It becomes necessary at this point to notice a question made on the argument as to the meaning of a passage in the case as settled.

The passage is as follows: "A mill was erected according to the terms of said contract, at an expense of about $6,000, with the full knowledge of said Mary, who made no objection."

It was urged on the part of the plaintiff, that the fact expressed by this statement was that Mrs. Eley in the first instance knew that defendant and Catlin were building the mill, but that it did not shew that she knew the terms on which they were building it.

The counsel for the defendant controverted this view, and insisted that this paragraph in the case, meant that Mrs. Eley had knowledge that the mill was built, and also had knowledge that it was done according to the terms of the contract made with her husband. We are satisfied that this position of the counsel for defendant is correct. It would be a forced construction of this language to confine the reference of Mrs. Eley's knowledge to the putting up of the mill. If we were to reject any antecedent, it would be quite as reasonable to exclude that which specifies the erection of the mill, as that which alludes to the terms of the contract. But we think we ought to apply what is said of her knowledge to all the preceding branches of the passage to which according to common understanding, is would naturally apply; and if we read the paragraph in question in this manner, we shall find it ascertained that she knew of the existence of the contract, and of its provisions, and of the erection of the mill under, and in accordance therewith.

It appears, therefore, by the record, that at this time, Ralph was in possession of the land, and acting as the owner. That the mill having been built under the contract

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with him, with the knowledge of Mrs. Eley, who held the legal but unrecorded title, while her husband was in possession, and by her allowed to deal with the property, and appear to the world, as the owner, and when, according to the contract between the husband and Erwin and Catlin, the latter had become entitled to a conveyance, an arrangement was fixed upon between Catlin and Ralph Eley, whereby the latter was to have half of the mill premises, being about fifteen acres, upon certain terms stated between them.

This arrangement was never consummated, but on the 30th of September, 1856, and before it was given up or rejected, Ralph Eley and his wife Mary conveyed to defendant Erwin an undivided half of the property by deed, recorded October 13, 1856; and on the 30th of the December following, the defendant conveyed to Catlin an undivided half of the undivided half which had been conveyed to him, and such deed was recorded January 6th, 1857.

Under these circumstances, and while the parties were in this position, Ralph Eley and wife, on the 25th of July, 1857, executed to Goodrich their mortgage on several parcels of land definitely and specifically described, and likewise included in the mortgage what the plaintiff claims to have been an undivided half of the mill property. It was described as the interest of Ralph Eley and Mary E. Eley, in a steam saw-mill and appurtenances, and the piece or parcel of land on which it stood, and as being owned by the mortgagors, and Erwin and Catlin of Detroit.

In July, 1860, or shortly after that time, Erwin and Catlin became vested with whatever title or right Ralph and Mary E. Eley had to the property, through a decree of the Court of Chancery, and it would seem that Erwin acquired the interest of Catlin in the premises about the same period.

The Goodrich mortgage was foreclosed against Ralph

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and Mary E. Eley, and the title resulting from that foreclosure became vested in one Jennings on the 24th of May, 1861; but on the 14th of January preceding, the defendant conveyed the mill premises to plaintiff by deed containing the usual covenant of warranty and against incumbrances.

Under this conveyance the plaintiff entered the premises and held exclusive possession thereof until September, 1861, when Jennings, claiming under the mortgage title, went in without process, and claimed an undivided half under the title arising from the mortgage. The plaintiff requested the defendant to protect the premises against this claim of Jennings, but he refused to do so on the ground that the mortgage title was not an incumbrance as against the title he had conveyed to plaintiff. The latter thereupon purchased the Jennings claim of title under the mortgage and commenced this suit, and the court below held that the claim under the mortgage constituted no incumbrance against the title conveyed by defendant to plaintiff, and accordingly awarded judgment to the former.

At the time the Goodrich mortgage was made, Erwin and Catlin had performed the contract made with Ralph Eley, for building the mill, and by the terms of that contract were entitled to a conveyance, and the only ground for a refusal to convey which could have been set up was that Mrs. Eley held the legal title instead of her husband, and was not a party to the contract. Her deed was unrecorded. Her husband was in possession and with her knowledge, and, so far as appears, without her dissent, managing and disposing of the property as owner. He contracted for the erection of valuable buildings upon the property and agreed that upon their completion they should be conveyed to the parties with whom he contracted. Mrs. Eley allowed Erwin and Catlin to go on and expend their money in making the improvements contracted for by the husband, in reliance upon these appearances, which must inevitably have led them, as prudent and careful men, to believe that her hus-

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band was acting for himself in respect to property interests of his own, and which he could control and bind. It does not appear that she gave any warning whatever to Erwin and Catlin or either of them, or to any one else, of any claim of her own, or that she in any manner intimated that her husband's dealings were unauthorized; but it does appear that she afterwards joined with her husband in deeding one-half of the premises to defendant, a transaction which can only be explained in view of all the facts, and particularly the unfinished arrangement for vesting half of the property in Ralph and leaving the other half for defendant and Catlin, by supposing that the deed to defendant was intended as a compliance with that part of the old agreement for building the mill, as proposed to be modified by the new unfinished arrangement, which left but half of the property to be conveyed for the benefit of Erwin and Catlin. This explanation, if sound, would warrant the inference that the giving of that deed was an act by Mrs. Eley in part performance of the contract made by her husband, and conclusive of her knowledge of that contract.

Such had been her course, and such the circumstances that she could not have withheld a conveyance under the contract without a violation of the plainest equity. According to the fact stated in the case she had seen Erwin and Catlin expend their money in valuable erections on her land, when she knew that they were doing so upon such representations of her husband as must operate as a gross fraud upon them if she should be allowed to retract the corroboration of the truth of such representations, which was involved in her acquiescence in his conduct, with full knowledge of the facts.

If Mrs. Eley had been unmarried there can be no question but that she would have been bound by her acquiescence in what took place. And under our statute which allows married women to "contract, sell, transfer, mortgage and convey their separate property in the same manner and with

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the like effect as if unmarried," I think the result must be the same. To hold otherwise would contradict the purpose of this statute, and impose or retain a disability, which, in general, could have no other effect than to cover fraud and injustice.

It is not improper to say that it does not appear that Mrs. Eley ever refused to join in conveying to defendant and Catlin, on the ground that she was not bound to convey; or, indeed, on any ground.

In view of the circumstances, we are of opinion that at the time the Goodrich mortgage was given, Mrs. Eley and her husband were in equity bound to convey to Erwin and Catlin; and that as against the former, the latter were the equitable owners of the whole mill property.

The mortgage purported on its face to convey an indefinite interest in the premises, not exceeding that possessed by the mortgagor, and did not profess to transfer the whole or any particular portion of the premises in question, or any specific undivided interest. It assumed to grant several other parcels of land, and those were definitely particularized and described, but in describing the subject of the mortgage in the mill premises, the parties carefully avoided the use of expressions which would denote a purpose to grant anything beyond the actual interest of the mortgagors. If it had been the purpose of the parties to make the mortgage in terms include a specific parcel of the mill premises, or any definite undivided interest, there could have been no difficulty in finding terms which would have plainly identified the portion or interest on the face of the instrument. It cannot be claimed, therefore, that the description found in the instrument should be read as specifying a definite or ascertained interest, such as an undivided half or the like; but it must be taken as meaning to convey the right which the mortgagor had, and subject to all existing equities. There was enough upon the face of the instrument to inform Goodrich that Erwin and Catlin had some interest,

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and that the right or title of the mortgagors, or the extent of it, was to be ascertained by inquiry, since the instrument did not purport to state it. The mortgagee was under these circumstances bound to make inquiries of Erwin and Catlin, and was chargeable with notice of all the facts to which such inquiries must have led. As he was chargeable with notice of the equities of Erwin and Catlin, his right became subject to those equities, and Jennings, who succeeded to the rights of Goodrich, could be in no better position than Goodrich himself.

When Erwin and Catlin succeeded in perfecting their title through the decree in Chancery, it enured to them as against the mortgage, as of the time when they became completely entitled to a conveyance, and the mortgage, as affecting the mill property, was cut off altogether. The judgment below should be affirmed, with costs.

The other Justices concurred.

The People ex. rel. the Treasurer of Wayne County v. the Controller of the City of Detroit.

Central Police Court: Fines: Penal Laws: Library fund. The prosecutions of offences at the Central Police Court, *chap. 15, sec. 11 City Charter*, are to be regarded as prosecutions under the penal provisions of the City Charter, and not under the municipal ordinances, and the fines so collected are to be applied to the support of township libraries.—*17 Mich. 390.*

Heard and decided May 10.

Mandamus to B. G. Stimson, Controller of the City of Detroit.

The following is the petition filed:

"Your petitioner, Paul Gies, respectfully represents and states to the court now here, that he is the duly elected and qualified treasurer of the county of Wayne, in said state, and that being such treasurer it becomes and is the

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duty of all officers and other persons, who shall collect or receive any moneys on account of any fines for breaches of the penal laws and for penalties, to pay the same over to your petitioner, within twenty days after the receipt thereof; that it is the duty of your petitioner to keep an accurate account of all such moneys paid to him, separate and distinct from all other accounts, and to credit the same to the library fund, and to account therefor to the board of supervisors of said county at each annual meeting of said board; and your petitioner further shows that it is also his duty as such treasurer, between the 1st and 10th days of April, in each year, to apportion among the several townships in said county, according to the number of children therein, between the ages of four and eighteen years, as shown by the last annual statement of the county clerk on file in his office, all fines for any breaches of the penal laws and for penalties, or upon any recognizances in criminal proceedings, when collected and paid in to him.

Your petitioner further shows that as he is informed, and verily believes to be true, the Central Police Station Court, so called, of the city of Detroit, is established and held under the provisions of an Act, "entitled an Act to revise the charter of the city of Detroit, approved February 5, 1857," approved March 12, 1861, and also under an ordinance of the City of Detroit, passed March 6, 1866, to which said ordinance reference is made for certainty, and a copy whereof is hereto annexed marked A.

And your petitioner further shows that said court held its first session, and first went into operation on the 2nd day of April, A. D. 1866, and that since that time and previous to the date hereof, large sums of money have been collected in said Central police station court, in payment of fines imposed by said court, for offenses tried and determined therein, and that said moneys were by the clerk of said Central police station court paid in to Edward S. Leadbeater, the treasurer of the city of Detroit.

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And your petitioner shows that said Edward S. Leadbeater, received in his capacity as treasurer of said city, from the said clerk of said Central police station court, being said fines aforesaid, the sum of eleven thousand and eighty-six dollars and twenty-five cents, ($11,086.25).

And your petitioner further shows that it is by law the duty of Benjamin G. Stimson, controller of said city, to open and keep an account with the treasurer of said city, in which he shall charge the said treasurer of said city with all moneys raised or received for each of the several funds of said city, and it is made the duty of the treasurer of said city to report to the said controller, at the end of each month, the amount received and credited by him to each fund, and on what account received; and your petitioner further avers that the aforesaid sum of eleven thousand and eighty-six dollars and twenty-five cents, has been so reported by said City Treasurer to said Benjamin G. Stimson, controller of said city of Detroit, together w ith the fund to which the same was credited, and that said city treasurer has been charged by said controller with said sum in his account with him.

And your petitioner further shows that on the 16th day of November, A. D. 1868, Emil P. Benoit, who was then county treasurer of said county, and the predecessor of your petitioner was ready and willing to receive said moneys and on said day duly and regularly demanded officially of said city treasurer, that he should pay over said moneys to such Treasurer of Wayne county, as aforesaid, and also on the same day duly demanded of Benjamin G. Stimson, who is the controller of said city of Detroit, that he should draw his warrant in favor of such Treasurer of Wayne county, upon said city treasurer, for the said moneys above stated. Your petitioner further states that said city treasurer of said city of Detroit after said demand, and on said 16th day of November, 1868, utterly refused to pay over said moneys to such Treasurer of Wayne county, and that said Benjamin

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G. Stimson, controller of said city, after said demand, and on said 16th day of November, 1868, utterly refused to draw his said warrant for said moneys upon said treasurer, and in favor of such Treasurer of Wayne county.

Your petitioner further represents that said Edward S. Leadbeater, treasurer of said city, has no power to disburse said moneys, nor any of the funds in the city treasury, except upon a warrant signed by said Benjamin G. Stimson, controller of said city, and has, therefore, and for that reason refused to pay over said moneys to your petitioner without said warrant of said controller.

And your petitioner further states that he is advised and believes that he is entirely without remedy in the premises, unless it be afforded to him by the interposition of this honorable court, by their writ of *mandamus*, and he therefore prays that an order may be made requiring said Benjamin G. Stimson, controller as aforesaid, to show cause within eight days after service on him of a copy of this petition, why a *mandamus* should not issue from this court, commanding him to draw his said warrant upon said Edward S. Leadbeater, city treasurer, in favor of your petitioner for all moneys remaining in said Edward S. Leadbeater's hands from those received by him, for fines and penalties imposed in said central police station court, of said city of Detroit, and that such other and further order may be had in the premises as justice may require.

The following is the ordinance referred to in foregoing:

AN ORDINANCE to prescribe the duties of the police justice in all cases of violation of city ordinances.

It is hereby ordained by the common council of the city of Detroit:

Section 1. It shall be the duty of the police justice to attend the city hall, or any other police station house where the lock-up shall be, on every day of the week, Sundays excepted, at the hour of seven o'clock, A. M., to examine into, try and determine the case of every person confined in said station house for vagrancy, disorderly conduct, or drunkenness, when the nature and circumstances of the case or complaint are such that the same may, and in the opinion of such

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justice should be summarily disposed of without a jury. All other cases of persons so confined, and the cases of all persons whatsoever, arrested on warrant issued from the Recorder's Court, shall be tried and disposed of in the mode and manner now provided by law. Upon conviction of any person or persons for any of the offenses herein set forth, the police justice may commit him or her to the Wayne county jail, or to the Detroit house of correction, for not more than six months, and impose a fine not exceeding fifty dollars and costs, and in default of the immediate payment thereof, to commit such person or persons to the Wayne county jail, or to the Detroit house of correction, for a term not exceeding six months, or until such fine and costs be paid.

Section 2. The police justice shall receive for his services in performing the duties required by the foregoing section the sum of 200 dollars per annum.

Section 3. It shall be the duty of the clerk of the police court to attend the city hall or any other police station house where the lock-up shall be, on every day of the week, Sundays excepted, at the hour of seven o'clock A. M., to keep a true record of the proceedings before the police justice at said station, in proper books to be provided therefor, and file and safely keep all papers pertaining to such proceedings; it shall be his duty to receive all costs, fines and dues of every description, from either party to complaints or prosecutions before said police justice, and which, by law, are taxable as justice's costs, and shall pay the same weekly to the city treasurer, and take his receipt therefor.

Section 4. Said clerk shall receive as compensation for performing the duties specified in said section 3, the sum of 200 dollars per annum.

Section 5. This ordinance shall take effect from and after the first Monday in April next.

Approved March 6, 1866.

The following is the answer of the defendant:

This respondent, Benjamin G. Stimson, now comes by his attorneys, Gray & Moran, and for answer to the said petition, and for cause why the writ prayed for should not be issued, says:

He admits that as charged in the said petition, said Gies is Treasurer of the County of Wayne, and that it is the duty of all persons receiving or collecting money for fines or penalties for breaches of the penal laws to pay the same over

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to said treasurer, to be by him kept and applied as stated in the petition.

But this respondent avers that the penal laws referred to are the general penal laws of the state, and do not mean breaches of the provisions of city ordinances of a limited and local application and intended merely for the better government of the city for and in which they are operative.

He admits that the central police station court was established under the statute and ordinance referred to in said petition; that said court went into operation at the time stated, that fines to the amount stated were collected by the clerk of said court, and were by him paid over to the Treasurer of the city of Detroit, who now holds the same.

Respondent also admits the duties of the said city treasurer and controller to be as stated in said petition, and that said treasurer did report to said controller as stated. He also admits the demand for the said money, and the refusal to pay the same as stated, and that said city treasurer cannot pay over said moneys or any other moneys in the city treasury, save on the warrant of this respondent.

And this respondent, further answering, says:

That the said fines, as aforesaid, imposed and collected in said court, were not imposed for or on account of any breaches of any penal law of the state. That long prior to the passage of the Act of 1861, referred to in said petition, there was and still is in force in said city, an ordinance duly ordained by the common council of said city, and approved by the mayor, a true copy of which is hereto annexed, marked exhibit "A," and which respondent prays may be taken as a part of his answer.

That all the fines so imposed and collected in said court were for offences against and complaints made expressly charging a violation of the provisions of said ordinance; that the greater portion of said fines were imposed upon charges of drunkenness or being a drunken person; that many of said fines were imposed for violations of the provisions of

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one, two, four, five, six and seven of said ordinance hereto annexed and marked "A;" that in all cases the complaints, under which the parties were tried and convicted, charged the offence of a violation of the said city ordinance and referred expressly to such ordinance.

All of which this respondent is ready to verify and prove, and prays that said writ do not issue, and that he be herein dismissed with his costs, etc.

(Signed) B. G. STIMSON, *Collector.*"

To the above answer was attached a statement setting forth a summary of fines collected at the Central station police court, to wit:

Found concealed	*Sec. 1, ch. 69.*	$ 40
Making noise	" 2, "	2,288
Vagrancy	" 3, as amended, *ch, 69.*	280
Disorderly persons	" 3, "	4,837
Indecent exposure	" 7, "	130
Drunken persons	" 8, "	5,162
		$12,737

P. J. D. Van Dyke, Prosecuting Attorney, and

H. M. Duffield and *G. V. N. Lothrop,* for relator.

Under the decision in the *County of Wayne v. the City of Detroit, 17 Mich. 390,* we are clearly entitled to a *mandamus* for the fines collected for drunkenness, vagrancy and disorderly conduct, under sections 30 of the ordinance referred to, and which, as shown by the return, amount to $10,279.

The ordinance referred to in the return can have no more weight than the ordinance of March 6, 1866, which was passed upon in that case.

We are also equally entitled to the fines collected under section 2, for it is included in *Comp. L. p. 493,* § *1550,* as amended in in laws of 1865, p. The amendment to city charter specifies disorderly conduct — *Laws 1861, p. 201.*

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The amendment to the charter says "vagrancy or disorderly conduct." The fines under this section amount to $2,288.

The remaining sections 1 and 7, are comprehended and referred to by the charter of the city as "violations of the city ordinances relative to breaches of the peace." The statute prohibited these offences, and affixed a penalty to their commission equally as to drunkenness and disorderly conduct, but instead of referring to them specifically, described them generally.

We contend that a violation of any of these ordinances is a breach of a penal law.

All of them except sections 1 and 4, are offences under the general laws of the state.

Sections 2 and 3 are included in *Comp. L., p. 493, § 1550,* as amended by laws of 1865, p.

Sections 5 and 6 are included in *Comp. L., p. 500, § 1579,* and *p. 1543, § 5874,* and *p. 1544, § 5880,* and *p. 1545, § 5881.*

Section 7 is included in *Comp. L. 1541, § 5861.*

Section 8 in *Comp. L., p. 1542, § 5868.*

See our brief in *County of Wayne v. City of Detroit.*

Gray & Moran, and *T. Romeyn,* for respondent.

In *17th Michigan Reports, p. 397,* is the decision of this court on a similar case.

That case holds:

1. That the continued provision as to fines for breaches of penal laws extends to the city of Detroit.

2. That in cases decided under authority of section 11, of chapter 13, of the Charter, the convictions are to be deemed as made under the charter, and not under the ordinance founded on it.

3. That this law is a penal law within the meaning of the constitution.

So far this court will doubtless consider the question as settled, and not open for argument.

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In regard to the larger part of the convictions (in fact all of them, except those for indecent exposure,) no specific penalty by way of fine is provided for, in the general law.

The proceedings are more to prevent than to punish. *See 1 Comp. Laws, chap. 42, p. 492.*

The charter gives a specific penalty for these offences when committed *in Detroit*, leaving the general law to be applied in the county everywhere.

The general provisions are not repealed as to the city by the charter, nor can the application of the one law be pleaded in bar of a prosecution under the other. *See 3 E. D. Smith (N. Y. Com. Pl.) 156; Hyatt's case 1 Wend., 380; 9 Howard, 569; 14 Howard, 19; 14 Alabama, 400: 6 Indiana, 852; 24 Missouri, 96; 13 Wend., 341; 15 Id., 215; Bish. Cr. Law, § 99, p. 690; Wheat. Cr. Law, § 542, 564.*

The general law of the state in a certain sense makes vagrancy and drunkenness offences throughout the state, to be guarded against and *prevented* within the locality of the city of Detroit. The charter of the city provides for their punishment, *when they have been committed*, by fine.

And the same charter places the fines in the city treasury.

The constitutional provision has its scope of operation and application under the general law. The charter is in effect but a municipal regulation.

This is the *equitable* construction. The county and city share alike in the proceeds arising under the general law.

And such is the *legislative* construction. This ought to be observed and upheld, if possible.

The proceeds of the convictions under sections 1 and 2 of the ordinance, are certainly not offences under the general law. They are mere municipal regulations.

Making a noise is punishable at common law, only when it amounts to a nuisance. *See 1 Russell on Crimes, 327.*

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For these and other reasons, we contend that the *mandamus* should not issue as prayed for.

Per Curiam.

All those fine moneys which were collected of persons convicted of drunkenness, or as disorderly persons or vagrants, amounting in all to $10.279, are within the previous decision of this court in *Wayne County v. The City of Detroit, 17 Mich. 390,* and there could have been no valid excuse for not paying them over on demand. We held before, that the penalties in those cases were not collected under the city ordinance at all, but under section 11 of chapter 13 of the city charter: the city ordinance being a mere re-enactment of that section, and therefore entirely idle and nugatory.

The remaining moneys are not covered by the former decision, but we think they fall within the same principle. It is the statute which gives the police justice the authority to hear and determine these cases, which prescribes what species of criminal conduct he shall take cognizance of, and what penalty he shall impose. We do not decide, nor intimate whether, if these cases were ordinary prosecutions under the city ordinances, the penalties imposed by the ordinances could be regarded as imposed under "the penal laws of the state." That question is not before us. The ordinary prosecutions for breaches of the city ordinances are had in the Recorder's Court, and not before the police justice. At the Central Police Court, are to be tried the cases of vagrancy and disorderly conduct—which cases do not come under the ordinances at all; and also "violations of the city ordinances relative to breaches of the peace." In regard to these latter cases, however, it is to be observed that the statute makes new and peculiar regulations concerning them, and that it does not refer to the ordi-

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nances at all except to ascertain what conduct is made a breach of the public peace by them. The ordinances are referred to for definition, and not for penalties.

This will be made very apparent by looking into the ordinance before us in this case, where we find that the same conduct when punished under it by prosecution in the recorder's court, may be punished by a fine of three hundred dollars; while if punished as a breach of the section in the city charter which we have referred to, the penalty is limited to fifty dollars. We are therefore of opinion that all of these prosecutions are to be regarded as prosecutions under the penal provisions of the city charter, and not as prosecutions in any proper sense under the municipal ordinances.

It was objected to this view, that in some cases shown by the return, the fines appear to have been imposed for acts which are neither vagrancy, disorderly conduct, nor breaches of the peace, and therefore, not within the section of the charter referred to, and not made criminal by any law of the state. The answer is, that the police justice only has authority to try in the court which imposed these fines, the cases enumerated, and we must assume that every case he has tried, was regarded by him as falling within one of these three classes. If in any case he has erred, and imposed a penalty for conduct which could not be legally thus classified, the error was one of law, for which the party convicted might at the time have had an appropriate remedy.

We cannot in this collateral proceeding, enter upon an investigation whether his rulings have been correct or not.

It is proper to say in this connection, that in coming to this conclusion, we do not, as counsel seem to suppose, hold any provision of the city charter to be unconstitutional. The charter provides that these fine moneys shall be paid into the city treasury, but it is to be presumed that the

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legislature designed the subsequent disposition of them to be in accordance with the constitutional provision.

The other Justices concurred.

Jesse Ganoe and another v. The Scow Jack Robinson.

Water Craft Law: Jurisdiction: Supreme Court; Appeal Cases. The jurisdiction given to this court under the water craft law, *L. 1864, p. 107*, in appeal cases, is none the less to be regarded as properly appellate, because it allows new testimony.

The allegation of the tonnage of a vessel in such proceedings is essential to jurisdiction.

Heard and decided, May 8.

Appeal from Ottawa Circuit.

This was a proceeding under the *Water Craft Law* (*Laws 1864, p. 107,*) against the scow Jack Robinson, for a certain claim for tonnage alleged to constitute a lien against said scow.

The claim was demurred to in the court below, but the demurrer was overruled, with leave to answer.

The defendant answered—and complainant filed his replication.

Judgment was rendered for complainant, and defendant appealed to this court.

When this case was called on for hearing, Mr. *Pond* for appellee, moved to dismiss the case for want of jurisdiction on the ground, that inasmuch as the statute contemplated a new hearing in this court, upon new evidence taken here, the jurisdiction was thereby made original, and not appellate, and a law granting to this court any but appellate jurisdiction was unconstitutional. But,

Per Curiam. The jurisdiction in these cases, is intended to resemble that formerly given in admiralty appeals to the United States Supreme Court, which is limited to ap-

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pellate jurisdiction, and yet was once empowered under the statutes to hear new proofs in such cases. In our Circuit Court also, appeals are heard on new evidence when taken from probate and justice's courts, and this was a familiar practice when the constitution was adopted. We think the jurisdiction is properly to be regarded as appellate.

The case came on for hearing upon the merits, and it appeared that there was no evidence showing that the vessel sued, was over 10 tons burden.

The court held this to be a jurisdictional defect, and reversed the proceedings and dismissed the complaint.

Holmes & Ballard, and *A. Pond*, for complainant and appellee.

Moore & Griffin, and *H. C. Akeley*, for defendant and appellant.

Wm. Dinnen v. Robert Baxter.

Justices court: Jurisdiction: Replevin: Affidavit. When nothing appears in a justice's court to impeach the jurisdiction in a replevin case when the affidavit had made out a proper showing, evidence on appeal, that the property involved was of greater value than one hundred dollars, cannot be allowed to overthrow the jurisdiction, and prevent the appeal from being decided on the merits.

Heard and Decided May 12.

Case Made, from Wayne Circuit.

This was an action of replevin commenced before a Justice of the Peace.

The affidavit upon which the writ was founded, stated the value of the property replevied at $99, and not exceeding $100.

The declaration claimed damages at $50.00. Judgment was rendered in favor of the plaintiff, whereupon defendant appealed the same to the Circuit Court.

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On the trial of the appeal, plaintiff was sworn as a witness, and testified that the value of the property described in the writ was over $150. The defendant thereupon moved the court to quash the writ and dismiss the case.

The court held the motion under advisement, and directed the case to proceed. The defendant then introduced testimony tending to show that the property replevied was worth less than $100.

At the conclusion of the evidence, the motion to dismiss was denied, and judgment rendered in favor of plaintiff: the court having found that the property replevied was worth less than $100.

Chipman & Weber, for plaintiff.

B. T. Prentiss and *Hoyt Post*, for defendant.

The court regarding the case as within the principle of *Merrill v. Butler*, recently decided, affirmed the judgment.

Louisa H. Skillman v. Jacob T. B. Skillman.

Divorce: Dismissing case when the purpose of the litigation has terminated. The wife filed a bill for divorce, and the court granted a limited divorce for one year only, with $250 alimony. The defendant appealed. After the year had expired, the case not having been brought to a hearing in the Supreme Court, the complainant petitioned for alimony, and for an allowance for expenses. The record was voluminous, and the court being satisfied that if the cause was proceeded in, an allowance ought to be made to the complainant exceeding the alimony allowed by the court below, refused to retain the case in court, and dismissed the appeal, with costs to complainant.

Heard and decided May 11.

Appeal in Chancery from Macomb Circuit.

The complainant filed her bill for a divorce, on the ground of cruelty. The Circuit Court, in August, 1867, awarded a limited divorce for one year only, with an allowance, by way of alimony of two hundred and fifty dollars.

The defendant appealed.

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E. F. Mead and *J. B. Eldridge*, on affidavits showing the complainant's needy condition, and her inability to employ counsel, now moved for an allowance for the support of herself and child, pending the litigation, and to enable her to bring the case to a hearing.

A. B. Maynard, contra.

The court, after looking into the affidavits and the record — which was quite voluminous — being satisfied that if the case proceeded, an allowance ought to be made to complainant considerably exceeding the amount of the alimony allowed by the court below, and which was the only remaining subject of litigation, refused to retain the case in court, and dismissed it with one hundred dollars costs to complainant.

Appeal of James W. Convers in the matter of the petition of the Grand Rapids and Ind. R. R. Co.

Petition for appraisal under General R. R. Law: Map and Survey. Section 19 of the General R. R. Law, as amended, *L. 1859, p. 559, 560*, requires the petition for an appraisal of lands to declare among other things that the company has "surveyed the route of its proposed road, in said county, and made a *map and survey thereof*, by which said route is designated, and that they have located their said road according to such survey and filed a certificate thereof, &c.

The "map and survey" required by the statute must be something more than a general outline map giving an approximate idea of the situation of the road, without *the means of fixing each point and course*. The map must embody or be accompanied by such full and accurate notes and data as will furnish complete means for identifying the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt as to where any portion of it is to be found

Jury in special proceedings: Presence of Court. The statute—*Laws of 1864, p. 14*—providing in such cases for an order by the court for a drawing of a jury and the issuing of the venire, contemplates that such drawing, &c., shall be made in the presence of the court at the time of making the order, and a jury drawn subsequently to the order and not in the presence of the court is illegal.

Jury: Vicinage: County. When the names of jurors are required to be drawn from the box, the "vicinage" from which they are to be summoned, means the county, and not the town or neighborhood in which the land to be taken lies.

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CONVERSE v. GRAND RAPIDS & IND. R. R. CO.

Jury in other than criminal cases: Peremptory challenge. Challenges for cause may be made to jurors summoned under the railroad law, to assess damages, but peremptory challenges are not allowed in such proceedings. No peremptory challenge lies in any but criminal proceedings, except where given by statute, and in these special proceedings no provision has been made for them.

Jury—Special cases: Peremptory challenges. The statute—*2 Comp. Laws*, § 4400—allowing two peremptory challenges in "civil cases" does not apply to special proceedings not in the ordinary course of law.

Heard and decided May 12th.

Appeal from Kent Circuit.

This is an appeal by James W. Converse, from proceedings on the part of the Grand Rapids and Indiana R. R. Co. to condemn certain lands of his for the use of said road.

The material facts are stated in the opinion.

George Gray, for complainant.

1. The drawing of the jury was by the clerk, in the usual form, in presence of a justice of the peace and the sheriff. It is not required to be in presence of the court.—*1 Comp. Laws, 641.*

2. It is objected that the jury were not all from the city of Grand Rapids or towns in the neighborhood. But the jury must be drawn from the jury-box; and the vicinity is equivalent to the vicinage or county.

3. The conditions precedent to the exercise of the right of eminent domain by a railroad company, are those prescribed by the statute in such case made and provided, and no other.

The only question made under this head by the appellant is, that the line was not lawfully located through the city of Grand Rapids, inasmuch as the consent of the common council was not given, and if given, was not lawful, in so far as it purported to give the right to locate the line on certain streets of the city.

The line was located, and the map filed. The consent of the common council was given, by ordinance of October 15, 1867, page 52.—*Gen. R. R. Law*, § *29, p. 646.*

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But we contend that this is a question, not between the appellant and the railroad company in this proceeding, and is not a condition precedent to the exercise of the right of eminent domain.

The conditions are prescribed in § *19, p. 638, 1 Comp. Laws;* no others are imposed or in issue. These conditions are complied with, and no proofs are introduced contrary.

The map filed shows streets, town lines, section lines, corners, &c. and was furnished with a scale, from which the whole can be determined.—*See* § *19, Supra.*

G. V. N. Lothrop, for defendant and appellant.

1. All conditions precedent to the exercise of the right of eminent domain by a railroad company must be complied with.

The company must comply with all the conditions of its charter, or of the laws requisite to enable it to go forward in the construction of its road before it can condemn lands.—*1 Redf. on Railroads, p. 234-5-6, 239; Atkinson v. Mar. & Cin. R. R. Co. 15 Ohio, St. 21; Gillinwater v. Miss. & A. R. Co. 13 Ill. 1.*

The lawful location of its line in Kent county was a condition precedent to this attempt by the company to seize on lands.—*1 Comp. Laws, 1963.*

2. The railroad company can locate its line through any city without leave of the common council.—*1 Comp, Laws, p. 643, 1973.*

3. No railroad company had any lawfully located route through the city of Grand Rapids at the time the petition was filed.

a. The map was the only paper filed. No minutes of survey at all accompanied the map. This was necessary for by this alone, could the line on the map be run and determined.—*1 Comp. Laws, 1960, 1963.*

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b. The city council of Grand Rapids had never consented to the location of the line through the city. No part of the location was ever before them, except so much as was upon certain streets. And though the assent to locate through Almy, Ferry and Blossom streets was given by the ordinance of October 15th, yet this was repealed by the ordinance of October 29th.

c. The common council had no authority to grant the use of a public street to the use of a steam railroad company; and hence no line could be lawfully located, which included such a street.

It seems to be now fully settled, that where the fee of a public street is in the adjacent proprietor, neither the legislature, nor the local authority, nor both together, can authorize a steam railroad to be laid on such street, without first providing for compensation to such proprietor.—*Cooley, Const. Law, 547 et. seq; Trustees v. A. & R. R. R. Co. 3 Hill, 567; Williams v. N. Y. C. R. R. Co. 16 N. Y. 97; Carpenter v. O. & S. R. R. Co. 24 Id. 655; Mahon v. N. Y. C. R. R. Co. 24 Id; Wagner v. Troy Union R. R. Co. 25 Id. 531; Springfield v. Conn. Riv. Co. 4 Cush. 63; Troy v. Chest. R. R. Co. 23 N. H. 83; Nicholson v. N. Y. & N. H. R. R. Co. 22 Conn. 74; Imlay v. Union Br. R. R. 26 Id. 249; City of Janesville v. Mil. & Mis. R. R. 7 Wis. 489; Ford v. Chi. & N. W. R. R. Co. 14 Id. 609; Pomeroy v. Chi. & Mil. R. R. Co. 16 Id. 640; Tate v. Ohio & Mis. R. R. Co. 7 Ind. 479; Scharmier v. St. P. R. R. Co. 10 Minn. 82; See Muffin v. R. R. Co. 16 Penn. St. 180.*

In New York it is held that where the fee of a street is vested in the people, or in the municipality, it is lawful for the legislature to devote the street to the uses of a steam railroad.—*People v. Kerr, 27 N. Y. 188, 200, 213.*

Still, it is conceded, even in such case, that the

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public hold the fee of the street, not as private property, but only in trust for public uses; and, perhaps, only for uses pertaining to public ways.—*People v. N. Y. & H. R. R. Co. 45 Barb. 83; People v. Kerr, 27 N. Y. 197-8-9, 212; Milbau v. Sharp, 27 Id. 611.*

In other states it is held that, even where the fee of a street is in the public, still the adjacent owner has a private right that the street shall be kept open, with unobstructed access to his lot, and that this right is properly within the constitutional protection.—*Tate v. O. & Miss. R. R. Co. 7 Ind. 479; Haynes v. Thompson, 7 Id. 38; Prutzman v. Ind. & C. R. R. Co. 9 Id. 467; New Albany & S. R. R. Co. v. O'Dale, 13 Id. 354; Cincinnati v. Cumminsville, 14 Ohio St. 523; Scharmier v. St. P. & P. R. R. Co. 10 Minn. 83.*

Such seems to be held in England.—*Thompson v. W. Sou. R. R. Co. 29 Law Times,* cited in note to *Redf. p. 310;* See also remarks of *Balcon and Marvin, J. J.* at end *of People v. Kerr, 27 N. Y. 188.*

And all the cases agree that no street or highway can be appropriated to the uses of a steam railroad, except under authority from the legislature; and hence, that a mere municipal license is void.—*Davis v. Mayor, 14 N. Y. 514; Milbau v. Sharp, 27 Id. 611; Com. v. N. E. R. R. 27 Penn. 354; Lackland v. N. Mis. R. R. Co. 31 Mis. 180; Milbau v. Sharp, 14 Barb. 435; People v. N. Y. & N. H. R. R. Co. 45, Id. 83.*

If built on a street without such authority from the sovereign legislature, it is a public nuisance.—*People v. Kerr, 27 N. Y. 188; Davis v. Mayor, 14, Id. 514.*

And not only is it in such case a public nuisance, but if it works any special private injury to an adjacent proprietor, he may maintain his private suit, either for prevention or redress.—*2 Redf. § 205, p. 308; Corning v. Lawrence, 6 Johns. Ch. 439; Ketchum v. Buffalo, 14 N. Y. 356; Davis v. Mayor, 14 Id. 514; Doolittle v. Supervisors, 18 Id.*

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160; People v. Kerr, 27 Id. 188; Milbau v. Sharp, 27 Id. 611; Penn. v. Wheeling Bridge, 13 How. 564.

Such authority must be clear. It is not to be presumed.—*State v. Warren R. R. 29 N. J. 353.*

4. The foregoing cases fully establish that the railway company that assumes to use a street, must be able to show full authority from the sovereign legislature.

The legislature has, in no case, authorized a railroad company to appropriate a public street for its road-way.

The general railroad law does, indeed, authorize the crossing of streets.—*1 Comp. Laws, 1972, Subdiv. 5 of 1961.*

But this gives no color to the claim to appropriate a highway for the line of road.—*State v. Warren, 29 N. J. 353*

Nor can any such power be derived from the power given the common council to determine the route and grade.

This gives the city no power to devote any land for that purpose. It may fix any lawful line; and no line can be lawful, the right to use which cannot in some way be lawfully acquired. After the line is fixed, the power to take and occupy the *situs* must be sought elewhere.

The very terms of the act show that it is only land held by the ordinary tenure as private property that can be acquired by a railroad company for its uses.—*1 Comp. L. 1961, 1962, 1963.*

No property held for public uses can, by the railroad law, be either bought or condemned.

Nor does the broad power conferred on municipal corporations, to regulate and control public streets, give any power to authorize them to be appropriated to any but common public uses.—*Davis v. Mayor, 14 N. Y. 517; People v. Kerr, 27 Id. 198-9; Lackland v. N. Mo. R. R. Co. 31 Mis. 180; People v. N. Y. & N. H. R. R. Co. 45 Barb. 83.*

And, without express legislative authority, municipalities can make no ordinance, nor do any act, which re-

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strains or surrenders such control.—*E. Hartford v. E. Hartf. Bridge Co. 10 How. 534; Milbau v. Sharp, 27 N. Y. 621-2.*

On this point I say, finally, that not only is there no authority in terms from the legislature to take streets for railway tracks, but the claim is in conflict with the express provisions of the act. See the provisions for fencing.—*1 Comp. Laws, 1987.*

This contemplates what is now recognized by all courts, that the use of a track for a steam railway is, from its very nature, an exclusive use.

This company therefore had made no lawful location of their route through the city of Grand Rapids, and they were not entitled to an order for commissioners.

4. The jurors were drawn, not in presence of the court, or of the judge holding the court. They were drawn out of court, by persons not authorized by statute, and therefore the act was wholly unofficial.—*Laws 1864, p. 13.*

5. The jurors were not from the vicinity, as required by the constitution.—*Art. 18, Sec. 2.*

Not one drawn was from the city of Grand Rapids. Only two or three were even from adjacent towns. Most of them were from remote towns in the county.

CAMPBELL J.

The appellant is owner of certain lands in and near Grand Rapids, and appeals from proceedings to condemn certain portions of them for the use of the Grand Rapids and Indiana Railroad. Several objections are made to the regularity of the proceedings, which will be noticed, so far as may be necessary.

The first and preliminary objection rests on the alleged failure of the petitioners to file in the county registry, the map and survey required by law to be left there before any proceedings can be had to take lands.

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Section 19 of the general railroad law, as amended in 1859, (*L. 1859, p. 559, 560,*) requires the petition for an appraisal to declare among other things, "that the company have surveyed the route of its proposed road in said county, and made a map and survey thereof, by which said route is designated, and that they have located their said road according to such survey, and filed a certificate thereof, signed by a majority of the directors of said company in the register's office of said county."

The case shows that a map was filed in the register's office, which is claimed to show the location of the road, but no other paper, survey or certificate was left in that office. It is claimed, however, that the map is sufficient, and that the term "survey" does not apply to anything but the work on the ground, of which the map is assumed to be the only record contemplated by the statute.

We understand by the term "map and survey," not only a delineation upon paper or other material, giving a general, or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line with courses and distances throughout, so that there can be no doubt as to where any portion of it is to be found. A map can be made to contain all of these data, so as to need no reference to field notes, but the information must exist somewhere. The map before us is singularly deficient. It purports to be drawn by a scale; but the lines of the road are not so laid down as to enable any one by the use of instruments to ascertain its location with any degree of accuracy. There is nothing to show its distance from corners, or other boundaries at any part of the line. There are no courses or distances given either on straight lines or on curves—and the lines

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are very irregular, and by no means parallel throughout—and a map drawn on such a scale could not be made accurately enough, by most draughtmen, to dispense with the aid of figures to denote place and distance.

We think that something more was needed under the statute.

It is also claimed, that the jurors were not drawn in the presence of the court as they should, as is alleged, have been drawn under the statute.

It appears that on January 23, 1868, the Circuit Court of Kent county ordered: "That there be drawn from the petit jury box of this county, a jury of twelve freeholders, &c. and that the clerk of this court issue a *venire* in the usual form, inserting therein the names so drawn, and requiring such jury to meet at the hour of 2 o'clock in the afternoon of the seventh day of February next," &c. On the 30th of January, the clerk in his office, and in presence of the sheriff, and of a justice of the peace, drew twelve names, and issued the *venire*.

Under the original provisions of section 20, of the statute, the clerk was directed to draw the names, but as it was to be done, "thereupon," that is to say, upon the making of the order, it may be doubted whether it was not to be done at once, in presence of the court or judge. But by the law of 1864, p. 14, the language is changed, and it is provided that "thereupon, said court or judge shall make an order for the drawing of such jury from the petit jury box of the county, and the said court or judge shall cause to be drawn twelve names from such box accordingly, and shall issue a *venire* in the usual form," &c. The statute contemplates that these things shall be done in the presence of the court, and at the time of making the order, so that everything may be consecutive, and may be done under judicial supervision. The counsel for the railroad had overlooked the amendment of 1864, which made clear

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what may perhaps have been more doubtful before. The jury was not legally drawn.

The objection that the jurors were not of the vicinage but from distant towns is not tenable. When jurors are drawn from the jury box, the vicinage means the county. No less range would make the drawing conform to other proceedings.

A peremptory challenge was allowed against a juror summoned as one of the talesmen, and he was set aside. This was erroneous. The only provision under our law allowing peremptory challenges in matters not criminal is found in the chapter of the compiled laws relating to the "Trial of Issues of Fact," and allows a challenge of two jurors in "civil cases" as well as in prosecutions. This does not apply to special proceedings not in the ordinary course of law, and which are regulated entirely by particular statute. Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings are confined to cases where the statutes have directly provided for them. In the recent case of *Livermore vs. Hamilton*, in the New York Court of Appeals (reported in New York Times of May 10) it was held, affirming the decision of the Supreme Court, that it was error to allow a peremptory challenge in proceedings under the Landlord and Tenant law, as such proceedings were not properly civil actions. These appraisals bear no resemblance to ordinary legal trials.

These points are all that we deem it necessary to decide in view of the position of the proceedings.

As the objections to the proceedings go to the original jurisdiction, and show that there was no right to make the application at all, our order must be simply to set aside the entire proceedings, so far as they affect the appellant, with costs. The statute provides for new

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proceedings where the title attempted to be acquired by the first appraisal is found defective.—(§ *1,970 C. L.*)

The other Justices concurred.

The People v. the Regents of the University.

Legislative interference with University: Validity: Homœopathic professorship: Constitutional law. A law passed in 1855, (*L. 1855, p. 232*) assumed to limit the power of the regents to regulate and manage the university, by enacting the following proviso: "*Provided*, that there shall always be at least one professor of homœopathy in the department of medicine."

Application having been made for a *mandamus* to compel the appointment of such a professor, the writ was not granted: the court being equally divided upon the question whether the legislature had power under the constitution to exercise any such control over the regents, who are vested with "the general supervision of the university, and the direction and control of all expenditures from the university interest fund."—*Const. Art. 13, § 8.*

Heard January 5. Decided May 13.

Motion for *mandamus* against the Regents of the University of Michigan.

The petition set forth that the present constitution of said state, by Article XIII, section 6, constitutes the Regents of the University of the State of Michigan, the Board of Regents of the University of Michigan; and by section 7 of the same Article, constitutes them a body corporate, known by the name and title of the Regents of the University of Michigan.

That the Legislature of said State, after the adoption of the constitution aforesaid, by section 5, entitled, An Act to provide for the government of the State University, and to repeal chapter 57 of the revised statutes of eighteen hundred and forty-six, approved April eighth, eighteen hundred and fifty-one, ordained as follows, viz: The Regents (meaning the Regents of said University,) shall have power to enact ordinances, by-laws and regulations for the government of the University, to elect a President, to fix, increase

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and reduce the regular number of professors and tutors, and to appoint the same, and to determine the amount of their salaries.

That said Legislature still subsequently, by an act entitled An Act to amend an act, entitled "An Act to provide for the government of the State University, and to repeal chapter fifty-seven of the revised statutes of eighteen hundred and forty-six, approved April eighth, eighteen hundred and fifty-one," (which said act was approved February twelfth, eighteen hundred and fifty-five,) amended said section five, by adding thereto the following words, viz: "provided that there shall always be at least one professor of homeopathy in the department of medicine."

That although the enactment above referred to is imperative upon the said Regents of the University of Michigan, to appoint such Professor of Homeopathy in said department of medicine, at least within a reasonable time after the passage of said last act; and although nearly thirteen years have elapsed since the approval of said act; and although there was not at the time of such approval, and has never been since, any Professor of Homeopathy in said department of medicine; and although the said regents as a board or corporation, have often been petitioned and asked by citizens and residents of this state, as petitioner is informed and believes, to make the appointment of such professor, and thus carry into effect said law, yet the said board, or corporation of regents, have hitherto wholly neglected and refused and still do neglect and refuse, to make such appointment, in direct violation of said act, and of duty imposed upon them thereby; and have never, at any time, since the passage of said act, and the time it became operative, made any appointment of a professor of homeopathy in the department of medicine in said University, and as your petitioner is informed and believes are taking no steps to carry out and accomplish the true intent and meaning of said act."

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The petition then concludes with the usual prayer for a *mandamus*.

The answer of the respondents, sets forth that by the provisions of the Constitution of the State of Michigan, they have the general supervision of the University of said State, and the direction and control of all expenditures from the said University interest fund; that the salaries of all professors in said University are payable wholly from said University interest fund; and these defendants claim and insist that it is their right, and their duty to determine what professors shall be appointed in said institution of learning; when the same shall be appointed, the amount of their respective salaries, and the several times when the same shall become due and payable. And they further insist that the provision of said act of the legislature of the State of Michigan referred to in said petition, which was approved February 12, 1855, and which provides, "that there shall always be at least one professor of homeopathy in the department of medicine," does not make it imperative upon these defendants that they should appoint such professor at any particular time, or that they should pay any appointee to such professorship out of the said University interest fund; and that a decision making such appointment mandatory upon these defendants would be in conflict with section eight of article thirteen, of the constitution of the State.

That the Medical Department of the University is located at Ann Arbor, in said State, and that it numbers between three hundred and four hundred medical students, and is at present, and for several years past has been in a very flourishing condition; that these defendants have earnestly sought to act for the best interest of said department, and for the continued and lasting prosperity of said University in all its various departments; that a very careful consideration of the question as to the wisdom of appointing such a professor of homeopathy, to be an instructor in the medical department at Ann Arbor, has fully convinced

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these defendants that such an appointment would be greatly prejudicial to the best interests of said University; that it would engender discord and strife therein, and drive therefrom nearly all medical professors and students now therein; and they admit, therefore, that they have neglected and refused to make such appointment, under the belief that they had a clear and legal right so to do.

That they are desirous of carrying out the expressed wishes of said legislature, so far as they can do so with safety to the best interests of the University under their charge, even though the said act of the legislature be not binding upon these defendants, and to that end and purpose they have proposed to establish a medical department of said University at some other place than Ann Arbor, in which the principles and practice of homeopathy shall be taught; and they are ready and desirous to establish such department, and to appoint one or more professors therein, as soon as they shall have the power and authority so to do, and the financial condition of said University shall warrant the additional expense, which shall thereby be incurred.

That they have at the present time no funds in the treasury of said University, unappropriated, out of which the salary of a professor of homeopathy in the medical department thereof, could be paid; and they further say, that the present income of said University is all absorbed in the payment of the salaries of professors already legally appointed, and the incidental expenses necessarily incurred in carrying on the several departments thereof."

Dwight May, Attorney General, furnished no printed brief.

D. Darwin Hughes, for relator.

The motion is for a *mandamus,* to compel the regents to appoint a professor of homeopathy in the department of

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medicine of the University, in pursuance of the act of the legislature of February 12, 1855. — *Comp. L. 2,187.*

1. It is a fundamental rule of constitutional law that an act of the legislature, not prohibited by express words, or by necessary implication, cannot be declared void, as a violation of the constitution, and in cases of doubt, every possible presumption not clearly inconsistent with the language, and the subject matter is to be made in favor of the constitutionality of state legislation. — *Sears v. Cottrell, 5 Mich. 251; Twitchell v. Blodgett, 13 Mich. 162.*

If the law and the constitution can in any reasonable manner be reconciled with each other, then the law must stand.

There is abundant reason and judicial authority to show that there is at least great doubt whether the power of the legislature to make this law has been taken away by the constitution. — *People v. The Regents, 4 Mich. 105.*

2. There is nothing in the constitution, taken according to its plain and obvious meaning, which invalidates this law.

That instrument recognized and affirmed certain powers which had been conferred upon the regents by the legislature, and, among other things, provided that the regents should have the "general supervision of the University, and the direction and control of its expenditures from the interest fund." — *Const. Art. 13, § 8.*

Supervision is the act of overseeing; inspection, superintendence. — *Webster's Dictionary.*

Control, is power, authority, government and command. — *Ib.*

It is apparent enough that the two words, as used in this section, mean the same thing, and that the regents are given the same power over the University itself as they are over the disbursement of its funds.

The word "control" when applied to the expenditure, cannot be construed as placing the University fund at the

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absolute disposal of the regents, independent of the legislature.

The sense in which the Constitutional Convention used the word "supervision" is clearly shown by the first section of the article on education, where it provides that "The Superintendent of public Instruction shall have the general supervision of public instruction, and his duties shall be prescribed by law." Here the same words are used, giving power to the Superintendent of Public Instruction over the whole system of State instruction, of which the University is a part, which are used in giving power to the regents of the University, and if the argument is good, that these words make the regents independent of the legislature, then it logically follows that they, to the same extent, and in the same manner, place the regents under the absolute control and dispensing power of the superintendent, a state of things that will scarcely be conceded by any one.

The first section, while it gives to the superintendent the general supervision of public instruction, also provides that his duties should be prescribed by law, showing clearly that within the meaning of the convention a "general supervision" is not inconsistent with absolute control in the legislature, and that such supervision should be in all respects under the direction and control of the legislature.

3. Such a construction as is contended for by the regents, brings the constitution in conflict with the declaration of the trust under which the University lands were granted to the State, while it should be so construed as to harmonize with and carry into effect that grant. It is manifest that the Constitutional Convention should be understood as speaking in accordance with the terms of such grant, and the constitution should be construed as violating its terms or spirit if it can in any way be avoided.

The first reservation of lands for a fund for this University was in 1804. — *2 U. S. Stat. p. 277.*

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It was made final in 1826,—*4 Id. 180.*

In 1836, Congress, by an ordinance, proposed to cede the lands to the State as follows:

"1. Section sixteen in every township for the use of schools."

This language is general, and contains no provision as to the manner of expending the money, except that it shall be for schools.

2. "That the 72 sections of land set apart and reserved for the support of a University are hereby granted and conveyed to the state, to be appropriated solely to the use and support of such University, in such manner as the legislature may prescribe."—*1 Comp. Laws, p. 38.*

The proposition contained in this ordinance was accepted by the State of Michigan.—*Id. p. 42.*

And thereupon the state was admitted into the Union. *1 Comp. Laws, p. 43.*

By the express terms of this grant, the appropriation of these lands to the purpose of the University for its support, was to be made in such manner as the legislature may prescribe.

This is no naked power which exhausted itself upon its execution by an appropriation or disposition of the lands, but it is a trust, which must last forever, and the application and appropriation of the fund must forever remain with the legislature, and be subject to its disposition; and the words "direction and control" in the constitution as applicable to the "expenditures" of the interest fund arising from these lands must be construed by every rule of good faith, and every principle of honesty and fair dealing, as a "direction and control," to be provided by act of the legislature which is the law to the regents, as it is the law of the land.

Under the plain terms of this grant then the funds of the University are placed in the hands of the legisla-

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ture as the hand and instrument of the state which is the trustee.

By what authority then is it claimed that the legislature has been deprived of this trust, and the regents have become vested with its powers.

The answer and the only answer is, by one party to the compact creating the trust; by the trustee itself, of its own will, its own volition, upon its own motion, without the concurrence or consent of the source from which the trust flowed.

Such a divesting of a trustee of the powers and duties of an express trust is inconsistent with every principle of fair dealing, and is repugnant to the elementary rules and principles of the law of trusts.

By the acceptance of the proposition contained in this ordinance the state is bound by solemn compact and treaty to maintain the university by the hand and strength, the the power of the legislative department of the state government; and in the light of this ordinance, and so as to accord with and carry out its terms and its meaning, must every provision of the constitution and every section of the laws of the legislature be construed.

The construction for which we contend pursues and is consonant with the terms of the grant.

The constitution provides that the superintendent of public instruction shall have the "*general supervision of public instruction.*"

That the regents shall have the general supervision of the university, and the direction and control of its expenditures of the interest fund.

In the nature of things the legislature must perform its duties and execute its powers through some agents, and these agents must have supervision, direction, and control, but not such as places them above or out from under the power of the legislature.

They have created the office of superintendent of public

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instruction to supervise the whole system of education, and to him must the regents, as well as the primary school officers, report. Under this general supervision of the superintendent are placed the regents, and they have supervision of the university as he has of the whole system, and also under him are placed the primary school officers to supervise that branch of the grant applying to their schools.

The respective duties and powers of all these officers are to be fixed by the legislature except that the constitution has provided that there shall be a board of regents through whom, for the purpose of electing a president of the university and expending the interest fund, the legislature shall act, and even those provisions are of doubtful validity for want of form in the convention to make them and preserve good faith in the execution of this grant.

4. The construction for which we contend has always been held by the legislature, and under such peculiar circumstances as to give it great weight.

The present constitution was adopted at the general election of 1850. The old constitution was silent as to the university.

The legislature of 1851 assembled almost immediately after the labors of the convention were concluded, and the constitution was adopted by the people.

It was composed largely of the members of the constitutional convention, having at least ten or twelve members who had belonged to that body, and at least two who have been promoted to the bench of the Supreme Court.

That body passed a law to carry into effect the provisions of the constitution upon this subject and for the reorganization and government of the university under that instrument.

This law proceeded to designate the title and declare the objects of the university.

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Declared it to be under the government of the regents, and that the regents were the corporation.

So far the law but in effect recites the constitution, and having plainly and carefully rehearsed its provisions it proceeds to declare, define and fix the power of the regents, and provide for the government of the university.—*Laws of 1851, p. 205.*

This law in the plainest terms declares the construction of the constitution for which I contend.

It is still in force and has for eighteen years been acted upon as the charter and fundamental law of the university. —*1 Comp. Laws p. 711.*

In 1855 the Legislature again declared this construction by the passage of the act now in question, and in 1859 they recognized the law of 1851 as binding and of full force by amending its provisions so as to modify the report of the regents to the superintendent, by omitting the journal of their proceedings.— *Laws 1859 p. 768.*

And again in 1867 by cutting off certain supplies to the university until the act of 1855 shall be carried into effect.

5. The regents themselves have given to the constitution the construction for which I contend.

They are to-day acting and carrying on the government of the university under the law of 1851.

They have by solemn resolution yielded their obedience to this law of 1855 and made a pretence of executing it, and have sought the aid of this court for an enforcement of its provisions.— *Regents v. Auditor General, 17 Mich. 161.*

6. Public policy and the welfare and prosperity of the University point to this construction.

To make the Regents independent of the Legislature is to perpetuate a contest, and lay the foundation for strife and jealousy, of which we have but seen the symptoms, and which can result only in disaster to an institution invaluable to the State, and of which we are already justly proud.

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The legislature has the exclusive control of the funds upon which the University must always depend.

It controls the sale of the lands and is the taxing power in the State and upon these sources the University must depend for its support. It is fit and proper that the same body which furnishes the fund should have the absolute control of its disbursement, and to so divide it, that the Legislature shall have no voice in its expenditure, is to weaken the interest of the people in the institution and to introduce an element of disaster.

7. The public good requires the enforcement of this law.

The policy which excludes the Homeopathic system of medicine from the University is bigoted and narrow minded.

The system has risen to the dignity of a school which entitles it to respect and to careful attention and study. And it has come to be a main branch of the science of medicine, and as such should have a place in every leading university in the country, and especially in ours.

C. I. Walker, for respondents.

The principal question involved in this case is: Has the Legislature the right under the Constitution, to require the Board of Regents to appoint a Professor of Homeopathy, as they have attempted to do by the act of 1855?

The University, as now organized was established under the act of March 18th, 1837, which act was re-enacted by the Revised Statutes of 1838--1846.—*Rev. Statues, 1837 p 234: Rev. Statutes, 1846, p. 216.*

Under this act the Legislature undertook to prescribe the number and kinds of professorships in the University, and to prohibit the establishment of any others except by Legislative consent.—§ *8* of those acts.

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These acts continued in force until the adoption of the Constitution of 1851.

The Convention that formed that Constitution exhibited, both in their debates and their work, a great distrust of the Legislative power. This is very manifest, in their restrictions upon legislative authority, both trivial and important.

Indeed, this distrust is the most notable characteristic of that Constitution framed by them.

This distrust was especially shown by their action upon the subject of education.

It is very evident that the Constitutional Convention of 1850 intended to place the entire power over the University in the hands of the Regents, who were elected by, and accountable to the people, and who as much represent the people as the Legislature themselves.

The evil sought to be avoided was the interference with the internal affairs of this great educational institution by a changing body not familiar with its condition or wants —*Convention Debates pp. 137, 782–4, 802–4.*

This intent may be clearly inferred from the general character of the Constitution; in its restriction of legislative power, and from the action of the Convention in relation to this very subject already referred to.

But this is also very clear from the language of the Constitution itself.

"The Board of Regents shall have the general supervision of the University, and the direction and control of all expenditures from the University Interest Fund."—§ *8, Art. XIII.*

They are to have not only the general supervision, but the *exclusive* direction and control of all expenditures, for there is no such thing as *direction* and *control* without its being *exclusive.*

The Legislature of 1851 gave a fair interpretation to

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this Artiele in Section 5 of the act passed relating to the University, and this interpretation was subsequently adopted by the Supreme Court.—*Session Laws, 1851, p. 205–6: The People, etc., vs. The Regents, 4 Mich., 78.*

"The Regents shall have power to enact ordinances, by-laws and regulations for the government of the University; to elect a President, to fix, increase and reduce the regular number of professors and tutors, and to appoint the same; and to determine the amount of their salaries.—*Session Laws, 1851, p. 205–6.*

This supervision, this exclusive direction and control of expenditure, involves, as a necessary incident, and by the clearest implication, this power "to fix, increase and reduce the regular number of professors," and to determine the amount of their salaries."

As to this doctrine of implied powers, see *Cooley Const. Lim. 63–4.*

The amendment to this act of 1851, under which the relators claim that the Board of Regents are bound to appoint a Professor of Homeopathy, is, we insist, clearly unconstitutional, as an attempt upon the part of the Legislature to exercise the power exclusively conferred upon the Regents.—*1 Comp. Laws, 2187.*

If the Legislature can require the appointment of one professor, they can of another or any number of others. And if they can say what professorships shall exist, they can say what shall not, and who shall fill Professors' Chairs. And if they can regulate the internal affairs of the University in this regard, they can as to all others, and thus the supervision, direction and control provided for by the Constitution in the Board of Regents is at an end.

Professors are not expected to serve without salaries, and if the Legislature can regulate the number and kinds of professors, they can indirectly direct and control as to expenditures.

Either the Legislature has no power of this sort, or that

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power has no practical limit, and the old state of things is restored. The legislature is supreme, and the Regents are their servants, bound to carry out their edicts, instead of being the representatives and servants of the people who elected them.

We insist that they have no such power under the Constitution.

The question is one of vital moment to the interests of the University, and we ask for it that careful consideration which its importance demands.

This tendency to legislative usurpation, foreseen and foretold by the fathers, and so natural and inevitable in a system like ours, needs to be held in check by constitutional provisions, interpreted and enforced by the judicial department of the government—a department coordinate with, but not subordinate to, the Legislature; a department that as truly represents the sovereignty of the people as any other in the government.—*Federalist, No. XLVII: Id. No. LXX.*

GRAVES J.

The Attorney General having applied for a mandamus to require the regents to appoint a professor of Homeopathy in the department of medicine in the University, pursuant to section 2,187 of the compiled laws, and the usual order for showing cause against the motion having been made, the Regents at the last January term made answer to the order, and alleged for cause against the application, that the part of the section referred to which provided there should always be at least one professor of Homeopathy in the department of medicine, was repugnant to the provisions of Article 13 of the Constitution, which confers upon the Regents the power of general supervision of the University. The question thus presented was ably argued by counsel, and we have considered it with an

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earnest desire to reach a decisive result. But in this we are disappointed by an equal division of opinion among the members of the court. As this circumstance would deprive our opinion of all force as judicial authority, we do not deem it expedient to superadd our reasonings to the elaborate arguments from the bar. It is seen that since the application cannot obtain the sanction of a majority of the court the motion must fail.

The other Justices concurred.

The People ex. rel. First National Bank v. Wayne Circuit Judge.

Circuit Judge: Power over a Referee's Report: New trial: A Circuit Judge has no power to order a new trial—on the ground that a referee's report is against the weight of evidence.

Heard and Decided May 13.

Application for writ of *mandamus*, to compel the respondent to vacate an order setting aside the report of a referee, and to enter judgment on the report.

The petition set forth, that on the 6th day of December, 1865, the First National Bank of Detroit, commenced suit against George Blumburg, in the Circuit Court for the county of Wayne, in an action of assumpsit; that the general issue being pleaded, the cause was referred to a referee for trial, by stipulation of the attorneys, on the 1st of February, 1867; that on the 19th day of November, 1868, the referee filed his report, in which he found in favor of the plaintiff; that no exceptions were filed on behalf of the defendant, to the report of the referee, but a motion for a new trial was entered in the special motion book on the grounds: 1st. That the facts in the cause were intricate, and the matters involved in the issue

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in such doubt and obscurity, is as to require a re-examination. 2d. That the finding of facts by the referee, was against the weight of evidence—and 3d. That the report of the referee was contrary to the evidence.

That this motion was subsequently argued before the Hon. Jared Patchin, Judge of the said Court, who gave his decision in favor of the motion, and caused an order to be entered, setting aside the report of the referee, and granting a new trial.

The answer of the Circuit Judge admitted the matters stated in the petition to be true, and set forth the following additional facts.

That on the argument of said motion, the testimony taken before the referee in the cause was produced, read and commented on by the respective counsel without objection, and as was then stated by agreement between them; and that he believed himself to have been possessed at the hearing of said motion of a full and complete knowledge of all the testimony taken before the referee.

That it appeared that said cause was pending before the referee some eighteen months, and that nearly that time elapsed between the taking of the first testimony and the filing of the referee's report.

That no question was raised on the argument of the motion, as to its regularity or the manner of getting the testimony before him.

And that after examination of the testimony, it was the opinion of the circuit judge, that the conclusions of fact found by the referee in his report, "were not only not sustained, but were disproved by the evidence."

A. Pond & C. I. Walker, for relator.

E. W. Meddaugh, for respondent..

It is a general principle well settled, that *mandamus*

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will not lie to compel an inferior judicial tribunal to reverse its decision, or to decide any matter entertainable by it in a particular way.

The proper province of the writ in such case is simply to set the court in motion.—*18 Wend. 75;* opinion of Tracy, and the cases there cited.—*21 Wend. 20; 20 Id. 658; 20, Pick. 484; Ex-parte Hoyt, 13 Peters, 279; 19 Wend. 68; Fish v. Weatherway; 2 Johns. Cases 215; Note B. as to mandamus and its uses.*

But when the court has no legal power to grant a new trial, but assumes to do so, *mandamus* will lie to compel entry of judgment.—*1 Johns. cases 180; note a.*

So where the court permitted an amendment of that which was not amendable, it was held that *mandamus* was the proper remedy.—*18 Wend. 675.*

This court seems to have recognized this writ as affording the proper remedy when the circuit court has exceeded its legal authority, as for instance, in permitting amendment of a declaration, so as to change the form of action.—*People v. Judge of Wayne county, 13 Mich. 266; People v. Judge of Wayne county, 1 Mich. 359; People v. Judge of Washtenaw, 1 Doug. 434.*

1. The court cannot by *mandamus* compel the circuit court to review its decision and reverse it; *provided,* the circuit court had jurisdiction of the matter of a new trial in this case.

a. The case made by the relator by implication concedes the order of the court to have been proper—that there was a sufficient showing to authorize a new trial, if the court had authority to entertain the motion.

The affidavit does not attempt to make out a case of abuse of the discretion, if the judge possesses it.

2. The motion to set aside the report of the referee, was properly cognizable by the court; and the power to set aside the report, and award a new trial, is possessed by it.

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1st. The cause is commenced in the circuit court, and goes to issue there.

It does not leave the court, nor is it at any time beyond the control of the court. The referee has a particular duty in the case to perform, and finally the court enters judgment.

2d. When the report is filed, it stands like the "finding of the court in term time."—*Laws of 1841, § 6.*

3d. Unless the court possesses this control over the report, great abuses may result.

a. The referee may find a state of facts against which the weight of testimony is overwhelming.

b. He may report a state of facts, which there is no testimony to establish.

The remedy for this is not to be found in sec. 8.

The Act of 1861, makes no change in the law as it stood prior to this, which has any significance in connection with this question.

No weight against our view is derivable from the fact, that the provision in the former, authorizing the court to require the referee to return the testimony, is here omitted.

This provision conferred no power upon the court, which it did not possess without it, and might therefore well be omitted.—*Fleter v. Heath, 11 Wend. 484.*

Nor does it make against our claim of the right of the court to set aside the report for the same reasons as the verdict of a jury, that the statute provides a mode of relief against certain errors of the referee.

The only errors of the referee, which the statute indicates the remedy for, are those of law.—*Laws of 1861 §§ 7 and 8.*

Without these provisions, there might be some difficulty in determining how these matters should be brought to the knowledge of the court.

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As to errors of fact, however, the mode of relief is suggested at once by the provision that the report "shall stand as the finding of the judge in term time."

It is very clear from the several provisions of this law, prescribing the mode for relief against the errors of the referee, that it was not the intention to leave parties to suits referred remediless, as in the case of arbitration.

The court may compel the referee to return the evidence (as we have heretofore indicated,) and may thus be possessed of the same means for hearing a motion for a new trial, as when the case is tried by jury in open court,

The view taken of the statute by the relator, if it prevails in this court, will render the statute, valueless. No one will dare refer a case.

On the other hand, why should not the court have control as over the verdict of a jury?

The tendency of recent legislation in our state seems to be towards clothing juries with absolute and irresponsible power over the facts of a case.

Unless the courts will come to the rescue, trials will be a farce upon justice.

4. As to this question, our statute does not differ from the early statute of New York.—*2 Rev. St. of N. Y. p. 306, 348.*

Held in New York under this statute, that the court might set aside the report of the referee for the same causes as the verdict of a jury.—*Fleter v. Heath, 11 Wend. 477; 18 Wend. 575; 19 Id. 68; Roberts v. Carter, 28 Barb. 442—5 Call. 90.*

So held in Rhode Island, that the court might grant a new trial upon report of a referee.—*6 R. I. 251; and New Jersey, 5 Dutch. 160.*

If the court does not possess authority to review and set aside the report of the referee for a finding without evidence or against it; then the act is unconstitutional.

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a. Because it vests judicial power in the referee. He may pass upon questions of law, viz:

That certain testimony establishes a state of facts which, as matter of law, it has no tendency to establish—and his judgment is final. See *Underwood v. McDuffer, 15 Mich. 361; Chandler v. Nash, 5 Mich. 409.*

This law points out no remedy for such an error, and for the court to afford it by construction, is to do just what we ask them to do for the other errors of the referee.

CAMPBELL J.

The only question before us on this application is, whether the circuit court can set aside a referee's report, as against the weight of evidence, and order a new trial.

We have had the subject of references, and their incidents before us several times, and have had our attention turned to questions not entirely foreign to this inquiry. But we have not heretofore felt called upon to consider the point now discussed, which is one of great practical importance.

We regard the judicial power vested in the circuit courts, by the constitution, as one which cannot be reduced or divested to any extent which would impair their general authority over proceedings pending before them. And it cannot be doubted that a power to grant new trials, is one not depending upon statutes in this state, but recognized as existing, and subject only to such regulation as would be proper in regard to all legal proceedings under the general provisions intended to produce system and efficiency. In looking at any statute which would seem to infringe any of their substantial powers, we are bound, therefore, to give no further effect to such reduction than is reasonably required to be done.

The fact that references are not compulsory, does not prevent them from being considered as a method of trial au-

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thorized by law, and not to be treated with any disfavor. And when a party elects to adopt this form of trial, we cannot consider him as compelled to waive thereby any rights which are consistent with a resort to it. Where a reference is compulsory no question of waiver arises, and no right is lost which the law ever vested in him. But where it is not compulsory, he waives just so much of his rights as cannot be made consistent with the practice he has chosen.

It is not easy to see how by resorting to a reference, a person must necessarily lose any of the grounds for a new trial, which can be retained without inconvenience.

The discovery of new evidence, fraud, misconduct, and other causes independent of the method of trial, would not be any more difficult to consider in one case than in another. But the granting of new trials because a finding is against the weight of evidence, involves, as usually considered, a knowledge of the character and incidents of testimony, only possessed by the judge who hears a cause. Where an issue is sent down from this court for trial, it is not customary to set aside a verdict as against the weight of evidence, if satisfactory to the circuit judge; and such has always been the practice in courts sitting in bank, who are called upon to decide such cases heard before a single judge. Although, there is an abstract power to do otherwise, the case must be an extreme one which would justify a departure from the rule.

A referee is not a judge, and does not act judicially in the strict sense of the term. But the difficulty does not arise from the judicial character of the presiding officer, but from the fact that no testimony can appear to those who did not hear it, precisely as it does to those who hear it. And while cases may often exist where the difference would not be serious, yet the rule must in general be otherwise; and there is always a presumption that evidence has

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been properly considered. The referee-law provides no method for preserving testimony. In case a party insists, before a referee, that there is no evidence tending to maintain a case, undoubtedly he raises a question of law, which will enable him to require a report showing what the testimony was, and this would be done by exception. But this does not require that minute and absolutely perfect reproduction of it which would be necessary to put the court in as good a position as the referee, to appreciate it. And this cannot be compelled, or attained under the law.

We feel that there may be many cases where the existence of such a power as was exercised in this case would prevent injustice; but we think the law is not so framed as to provide any adequate means for its exercise. And we are compelled to hold that by electing to refer, the party loses his right to complain that the finding of the referee is against the weight of evidence.

The *mandamus* must be granted; but as the point is new, and one which it was desirable to have settled, we do not feel disposed to impose costs.

The other Justices concurred.

Tunis Ryerson et al. v. Samuel D. Eldred et al.

Bill of review: Decree, mode of entering: Laches. The Circuit Court cannot allow a bill of review upon a decree made by this court on appeal. If allowable at all, it must be upon leave granted here.

No review can be had of any decree of this court upon the record as it stands. If there can be any opening of a case decided on appeal, it must be for matters of fact newly discovered, and where there has been no laches.

Decrees of this court are made complete by entry on the journal. No separate signing or enrollment is needed.

Sheriff's execution-deed: Altering decree: Rents of execution-debtor. When a sheriff's execution deed, under a judgment at law, is made after a decree of this court, it is no ground for altering a provision in such decree requiring tenants to account for rents to the execution-debtor.

Heard and Decided May 11.

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RYERSON ET AL *v.* ELDRED ET AL.

This case was decided at the January term of 1869, and is reported *ante p. 12.*

An application was now made for a re-hearing or such other relief as might be proper upon a showing substantially as follows:

It is claimed that by the decree possession is given of a larger tract than was covered by the contract under which the rights of Samuel D. Eldred accrued. Copies of the various papers were set out, but as the court did not discover any misdescription, it will not be necessary to recite them.

The affidavits set out also that Samuel D. Eldred's interest was sold on execution in December, 1864, and that a sheriff's deed was made to one Bunker in January, 1869, and they claim that the sheriff's vendee, and not Eldred, was entitled to possession.

They further set forth that the title had, before the assignment to Francis S. Eldred, become vested in all the partners by conveyance from Samuel D. Eldred to Eben Smith, and from Smith to them, and that it had been agreed before the hearing that these papers might be read, and that the omission to set them forth in the bill was accidental.

It was also set forth on belief that the assignee was not aware of the contract held by Samuel D. Eldred from the other partners. It was also claimed that the decree of the Supreme Court was not enrolled and signed by the judges. It also appeared that the Circuit Court had granted leave to file a bill of review, and one had been filed accordingly.

E. S. Eggleston, in support of the application, cited

Stafford v. Bryan, 2 Paige, Ch. R. 47.

G. V. N. Lothrop, contra, referred to

Southard v. Russell, 16 How. R. 547, 570; Prevost v. Gratz, 1 Pet. C. C. R. 379; Daniel v. Mitchell, 1

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Story C. C. R. 200; Dexter v. Arnold, 5 Mason's R. 303; Baker v. Whiting, 1 Story C. C. R. 230; Mead v. Arms, 3 Vt. 148; People v. Mayor of N. Y. 25 Wend. R. 252.

D. D. Hughes, in reply.

Per Curiam.

We can pay no attention to the proceeding in the circuit allowing a bill of review. The decree complained of is a decree made by this court sitting as a court of last resort; and if any such bill can be permitted at all, it can only be done by the leave of this court. — *Southard v. Russell, 16 How. R. 547; Stafford v. Bryan, 2 Paige, Ch. R. 47.*

Nor is there any force in the suggestion that our decree has not been enrolled. Decrees in this court are never made in any other way than by entry on the journals. The decree, therefore, which was sent down to the circuit for execution, was final and complete.

It certainly seems a novel proposition that a re-hearing or review should be granted in this court after judgment actually entered and remitted to the circuit. It seems to be laid down quite generally that the House of Lords (whose practice we follow principally in appeals), will not review its decisions. — *Attorney General v. Ward, 1 Myl. & Cr. 449; Brown v. Aspden, 14 How. R. 25; Mitf. Eq. Pl. 79; People v. Mayor, 25 Wend. R. 252.*

And it would be out of the question to have a re-hearing in this court on any new facts or case, because we can only review or hear a case on the record as it comes up from the court below.—*Sears v. Schwartz, 1 Doug. R. 504.*

If there can be any relief it must be by permitting some proceeding to be had below, based upon a showing of some new facts which were not before us. If there is power to grant this relief it can only be for the same reasons which would justify the court below in granting it where there has been no appeal.

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It does not appear from the papers now before us that the description of property in the decree is erroneous. We cannot discover any mistake from a comparison of the papers before us, and the contract professes to cover all property owned at Muskegon.

Upon the other points no equity whatever has been made out. The condition of the title was directly involved in the suit. It was discovered before the hearing that the deeds now offered were neither alleged nor proved, and after a hearing under such circumstances there could be no propriety in opening the case for that omission. But as the rights of Samuel D. Eldred under his contract, are the same in equity whether those deeds are proven or not, the defect becomes immaterial.

As the knowledge by Francis S. Eldred of the contract was shown by proof in the cause, any evidence to rebut it should have been introduced before hearing. He was a competent witness, and the only one likely to have known that fact, and there can be no possible excuse for not calling him. His affidavit now produced, moreover, does not deny the notice positively, and the proofs are quite as satisfactory to our minds.

It also appears that the execution proceedings were, or should have been, known before the hearing, as there are proofs in the cause directly referring to them. But these also are immaterial, for until a deed is obtained from the sheriff no possession can be obtained under an execution title. This deed was made after our decree, and the account, therefore, includes nothing that could interfere with it. If there should be any equities between Eldred and Bunker, these parties are not concerned with them.

There is no ground for relief shown, and the application must be denied, with costs.

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JULY TERM, 1869, AT LANSING.

Frederick Motz and 13 others v. The City of Detroit et al.

Assessments for local improvements: Taxing districts: Frontage: Constitutional law: Uniform rule of taxation. The provisions of the state constitution requiring a uniform rule of taxation, and cash valuation, in the local assessment of property *Const. Art. 14, § 11, 12*, have no application to local assessments for local improvements, such as the grading and paving of a city street, but relate only to the valuation of property, and its taxation for general purposes.

Apportionment: Taxation. But apportionment of the burden is a necessary element in all taxation, and any attempt at the exercise of this power, without it, is absolutely void.

Paving Assessment: Taxing Power: Police power: City Charter: Constitutional Law: Interior spaces. The charter of Detroit provided that the Common Council might cause the streets to be graded and paved, and assess the whole expense of such grading and paving in front of any particular lot, to the center of the street, upon such lot, and make such assessment a lien upon the premises until paid, and also a personal charge against the owner, and authorized a warrant for distress and sale of his goods for the same.*

Held, that such assessment cannot be sustained as an exercise of the taxing power of the state, inasmuch as it wholly disregards apportionment.

Neither can it be sustained as an exercise of the police power of the state, as parties cannot be compelled to make improvements of this character under such power.

But the apportionment of the expense of the burden for such an improvement may as properly be made on a ratio of frontage, as on one of valuation, if in the opinion of the legislature the former system is most just and equitable. In such cases there must be taxing districts, and the apportionment must be made throughout such districts.

Held, further, that a provision in the charter authorizing the assessment of the cost of the grading, paving, &c., of the interior spaces (at the intersection of streets) upon each block, in such proportions as the common council should deem just and equitable, is constitutional.

Common Council: Effect of acceptance of contract. Where the Common Council duly accepted and approved certain paving done in pursuance of a contract entered into between the city of Detroit and certain contractors; in a bill by taxpayers to enjoin the collection of the cost of such work: *held*, that this court has no right

*The charter has since been amended in this respect. See *Laws 1869, Vol. 3, 1686.*

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to review the decisions of said Common Council upon the facts: It not being charged that fraud or mistake has intervened and influenced such decision. So long as the Common Council keep within the limits of their jurisdiction as defined by the constitution and statutes of the state, and the members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the court have no power to control the exercise of their legal discretion, or to overrule and set aside their judgment, but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all of its inhabitants.

Effect of petition for paving, on illegal assessment: Equitable estoppel. Where several taxpayers petitioned the Common Council to cause a certain street to be paved and the paving was completed in compliance therewith, without complaint or objections on their part to the acts of the contractors or the Common Council in relation thereto: *Held*, that they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment for its cost, and to have impliedly, at least, consented that such an assessment should be made.

Whether, therefore, such assessment is legal or not, there is no ground for claiming the interposition of a court of equity to restrain the collection of such assessment by injunction.

Heard April 28. Decided July 12.

Appeal in Chancery, from Wayne Circuit.

The bill in this cause was filed by fourteen tax payers to restrain the city of Detroit, through its officers, from enforcing an assessment sought to be enforced against their lots fronting on Grand River street, for paving the same with "Nicholson Pavement."

The bill set forth that the said lots were unequal in frontage and depth, and that several were irregular and triangular in form, that the street fronting them was of unequal surface and required much excavation and filling up, and that some of said lots were vacant and some highly improved.

That the said pavement was a patent and owned by the contractors and was therefore a monopoly, and hence there could be no "lowest bidder" under the city charter.

That the construction of said work was defective in several material respects.

That each of said complainants were charged in the assessment rolls (copies of which were attached to the bill), with the gross cost of the expense of the pavement in front of each lot, without reference to the amount paid by any other lot.

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The bill further charged that the Common Council had not complied with the provisions of the charter, and the charter itself was unconstitutional.

A perpetual injunction was prayed for.

The answer denied that the said pavement was a monopoly, or that the work was improperly executed. That the Common Council having accepted the work, the complainants had no right to object; and, further, that eight of the complainants having signed a petition requesting the Common Council to pave said street, and having made no objection during the progress of the work, were estopped from asking relief.

From the testimony of the City Surveyor who prepared the several assessment rolls, it appeared they were made as follows:

1. The expense of the *paving* from the line of one cross street to another was assessed as follows:

The actual cost of the *paving* immediately in front of a lot to the centre of the paved street was assessed upon said lot.

2. The expense of the *grading* between the same lines was computed in gross, and then assessed upon the lots within said lines according to their frontage.

3. The expense of the paving, grading, curb stones, etc. of the spaces produced by the intersection of streets with said Grand River street was assessed as follows;

a. If the street crossing Grand River street was equal in width on both sides, then one-fourth of the cost of paving etc., of the spaces produced thereby was assessed upon one-fourth of the superficial feet of the block adjoining the respective four angles.

b. When the width at the point of entrance and exit of a cross street varied, then the cost of the space produced on either side of Grand River street to its centre would be divided equally between one-fourth of the two adjoining blocks on the respective sides of the street.

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c. When a cross street entered Grand River street, but did not cross it, then the cost of paving, etc., of the space produced by it to the centre of Grand River street would be assessed equally upon one-fourth of the superficial area of blocks adjoining said portion of said interior spaces so paved.

d. When a block was triangular, then the expense of the one-fourth of the interior space would be assessed upon one-third of the superficial area of such triangular block; but if the adjoining block was not triangular then *the other half* of the cost of said space would be assessed upon one-fourth of it.

The following is the provision of the City Charter under which said assessments were made:

"The Common Council shall have power to grade, pave, repair, and otherwise improve the highways, streets, interior public spaces," etc., and to provide for paying the costs and expenses thereof by assessment on the owner of the lot or premises in front of or adjacent to which such highways, streets, etc., may be directed to be graded, paved, re-paved or otherwise improved. *Provided,* That the cost of such grading, paving, etc., such interior or public spaces shall be assessed to each block in such proportion as the Common Council shall deem just and equitable; *Provided, further,* that each block shall only be assessed to the centre of such interior or public space."

The case was heard upon the pleadings and proofs, and a perpetual injunction was granted.

A. D. Fraser, & Wm. Jennison, for complainants.

1. Of the fourteen complainants, six signed a petition to the common council to cause Grand River street to be paved; but not with any specific kind of pavement.

The right of petition is a privilege common to every citizen, and carries with its execution nothing more than the expression of a desire that the legal authorities should

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gratify a reasonable wish within the legal power. The request assumes the existence of a legal power and a legal exercise of it.

It was for the city to determine whether it had the power.

There is no privity of contract—no principle of agency involved. The city could order the paving without any petition. This act of petitioners, therefore, created neither a legal nor equitable bar to their raising any legal objection to the tax.—*City Charter, p. 50, § 14, and p. 120.*

2. The contract entered into between Smith & Cook, and the city, among other requirements, prescribed:

1st. That the "best of materials" should be used.

2d. That "beach or bank-sand or gravel" should be used for the road bed.

3d. That the "spaces between the blocks" should be filled with "clean gravel and hot coal tar," and that the gravel should "be applied thoroughly dried and heated enough not to chill the tar."

The breach of these conditions are alleged as a violation of said contract.

The testimony tends to show:

a. That the sand used did not comply with the specifications.

b. That the gravel was not applied hot when put into the spaces between the blocks.

The defendants admit that no artificial process was adopted to dry the gravel, but insist that the sun dried the gravel sufficiently.

The contract required that the gravel should be thoroughly heated when applied, and it is not for the defendants to urge that some other mode was equally as good: Besides, Nicholson Pavement is a patent, and cannot be varied.

The failure to construct said pavement according to the terms of the contract is a good defense to the enforcement of the tax.

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3. The acceptance and approval of the work by the city concludes the parties to the contract; but no others. The complainants were not parties.

When the city seeks to deprive the citizen of his property to pay for such an improvement, he has a right to ask if the proper steps have been taken to justify the exercise of this sovereign power; and this involves an inquiry into the mode of performing the work. This is the first time that he could exercise the right.

If the work was imperfect, the owner of land adjoining it was liable to pay for its repair, or re-paving.—*City Charter, p. 8.*

4. The chief question is, was the assessment complained of made in accordance with law?

Seventeen of the complainants' lots front upon Grand River street.

Of these, eleven lots are triangular, and of irregular form, while three lots belonging to the other complainants front upon side streets.

These lots vary in frontage, in depth and in superficial feet.

Some are vacant, and some have valuable buildings upon them.

In addition to these diversities, the grading in front of the several lots, varies in a very great degree.

Then, again, many of them extend through to other streets, and thus have two fronts.

While again others (owing to the angle at which certain streets cross Grand River street upon one side of the street) have no lots opposite them to bear a share of the paving, on account of interior spaces formed by irregular streets.

The blocks which give rise to these diversities are more irregular than the lots.

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There is, perhaps, no main thoroughfare in this city, which presents such a strange variety of form and surface of both lots and blocks as does this one.

The resolution of the common council was to "pave Grand River street from First street to Eighth street."

Mr. Robinson, the City Surveyor, who prepared the assessment rolls, testifies that several distinct principles were applied in preparing them, viz:

First: The expense of the paving from the line of one cross street to another was assessed as follows:

The actual cost of paving immediately in front of a lot to the centre of the paved street, was assessed upon said lot.

Second: The expense of the grading between the same lines, was computed in gross, and then assessed upon the lots within said lines according to their frontage.

Third: The expense of paving, grading, curb stones, &c., of the spaces produced by the intersection of streets with said Grand River street was assessed as follows:

a. If the street crossing Grand River street was equal in width on both sides, then one-fourth of the cost of paving, &c., of the spaces produced thereby were assessed upon one-fourth of the superficial feet of the block adjoining the respective four angles.

b. When the width at the point of entrance and exit of a cross street varied, then the cost of the space produced on either side of Grand River street to its centre would be divided equally between one-fourth of the two adjoining blocks on the respective sides of the street.

c. When a cross street entered Grand River street, but did not cross it, then the cost of paving, &c., of the space produced by it to the centre of Grand River street would be assessed equally upon one-fourth of the superficial area of blocks adjoining said portion of said interior space so paved.

d. When a block was triangular, then the expense of

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the one-fourth of the interior space would be assessed upon one-third of the superficial area of such triangular block; but if the adjoining block was not triangular, then the other half of the cost of said space would be assessed upon one-fourth of it.

5. We insist,

a. That these assessments were made in violation of the mode prescribed by the charter.

b. That the provisions of the charter, regarding the mode of making these assessments are in violation of the constitution.

It will not be denied that the Common Council, in a proceeding of this nature, are strictly confined to the terms of the charter.

When the mode is prescribed it is as essential to follow it as to keep within the power. — *Cooley's Const. Lim. 195; Sutton's Heirs v. City of Louisville, 5 Dana, 29, 30; Bank of Augusta v. Earle, 13 Peters, 587; 18 Ohio, 318; 2 Comst. 70; 3 Barb. 275; 9 Id. 152, 535; 23 Id. 166.*

The charter provides that the entire cost of grading, paving, &c., should be paid by assessment on the owner of the lot in front of or adjacent to which such street, &c., may be directed to be paved.

In other words, the lot must pay for the gross cost of the improvement in front of it. — *City Charter 1867, p. 54, § 103, subd'n 11; Woodbridge v. Detroit, 8 Mich. 274; Williams v. City of Detroit, 2 Id. 560.*

The surveyor testifies that the cost of the paving only was so assessed.

But that the gross cost of the grading of a block was divided between the lots according to their frontage.

This, then, was in violation of the charter, and therefore without authority.

The charter further provides that the cost of grading, paving, &c., of the interior spaces "shall be assessed in

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such proportion as the Common Council shall deem just and equitable."— *City charter, p. 55.*

This power, we contend, the legislature could not delegate, because it did not possess it.

(See this point discussed under next head.)

6. The provision in the charter is unconstitutional.

And, first, under what class of powers, if found at all, does it come?

It must be found under one of three powers.

a. The right of Eminent Domain.

b. The Police power.

c. The Taxing power.

It cannot be maintained under the first. It is not a taking of property in the first instance for some public purpose. And if it were, the prescribed constitutional method of ascertaining its value for the purposes of compensation has not been observed.— *Const. Art. 14, § 2.*

Neither can it be sustained under the second. The courts thus far have confined themselves to sidewalks.— *Cooley's Const. Lim. 27 Cal. 613.*

We claim, then, that this law can only be sustained under the taxing power.— *Williams v. Detroit, 2 Mich. 560; Woodbridge v. Detroit, 8 Id. 274; Cooley's Lim. p. 505.*

The following are the general provisions in our constitution:

"The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied upon such property as shall be prescribed by law."— *Const. Art. 14, § 11.*

"All assessments hereafter authorized shall be upon property at its cash value."— *Art. 14, § 12.*

"The legislature shall provide for an equalization, by

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a State Board, &c., of assessments on all taxable property, &c."—*Art. 14, § 13.*

"The legislature shall provide for the incorporation of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."—*Art. 15, § 13.* (The word "assessment" is omitted.)

"Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless compensation, &c."—*Art. 15, § 15.*

"When private property is taken for the use or benefit of the public the necessity for using such property, and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury, &c."—*Art. 4, § 2.*

"The property of no person shall be taken for public use, without just compensation therefor."—*Art. 14, § 14.*

The first inquiry is, has the legislature, in authorizing this mode of raising the expense, exceeded its constitutional power?

Under the weight of modern authority, the constitution being but a limitation of the legislative power, this question is answered by another: Has the power been prohibited by the state constitution?

We answer, yes. The legislature "shall provide *a uniform rule of taxation.*" *Const. Art. 14, § 11.*

What is taxation? It is the exercise of the power which takes money from the citizen as part of his contribution to a public burden. And it operates upon a community or class, and by some rule of apportionment by which the amount paid by one person or piece of property shall bear some relation to the amount paid by another. The very idea of a tax suggests an orderly, equal and fair distribution. — *Woodbridge v. Detroit, 8 Mich. 274; People v. Mayor of Brooklyn, 4 Comst. 419; Cooley's Const. Lim. p. 479; Blackwell on Tax Titles, p. 80, 10 Ohio 165;*

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Municipality No. 2 v. White, 9 La. 447; State v. Merchants Ins. Co. 12 La. 802.

While the right to tax is an attribute of sovereignty, still it is limited by certain well defined principles of constitutional government. — *Sedg. Const. Law, 414; Tyson v. Halifax, 51 Penn., 9; City of Covington v. Southgate, 15 B. Mon. 498; Merrick v. Amherst, 12 Allen 504; Morford v. Unger, 8 Iowa, 92; Ryerson v. Utley, 16 Mich. 276; 2 Kent's Com. 231; Cooley's Const. Lim. 493 12 Cal. 76; Burnet v. Sacramento, 18 Id. 343.*

Taxation not levied according to principles upon which the right to tax is based, is an unlawful appropriation of private property for public uses.

This power, then, must be exercised with some regard to a distribution of burdens, and not arbitrarily.

a. It cannot be based upon the idea of benefits:

The improvement of private property is no part of the object of government, and if it were so, there is no mode provided for ascertaining benefits. — *9 La. 451, supra.*

b. It is equally clear that taxation, as such in general, can only be justifiable for public purposes and affecting some well defined community.

c. Some *rule of apportionment* must be observed; and these principles apply equally in local assessments. — *Cooley's Const. Lim. 504, 5, 507, 8, 495, 9; Weeks v. Milwaukee, 10 Wis. 243; Lumsden v. Cross, 10 Id. 284; Knowlton v. Sup. of Rock Co. 9 Id. 419; Municipality No. 2 v. White, 9 La. 451; Scovill v. Cleveland, 1 Ohio 126; Hill v. Higdon, 5 Id. 243, 5 Id., 589; North. Ind. R. R. Co. v. Connelly, 10 Id. 159; Maloy v. Marietta, 11 Id. 636.*

Whether the tax be confined to a territorial limit or not, this *uniform rule* applies equally to local as well as general assessments.

This being so, is there anything in the constitution which modifies this rule, when assessments for local im-

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provements are sought to be made by municipal corporations?

We answer no. — *Const. Art. 15, § 13; 9 and 10 Wisconsin, and 5 Ohio, supra.*

In the Wisconsin and Ohio constitutions, the word "assess" is contained in the section empowering municipal corporations to levy taxes for local improvements, and the courts of those states say that were it not so, assessments similar to those in question could not have been sustained.

In view of the provisions of the constitution — in view of the fact that the legislature has not established taxing districts — we insist that this tax should be assessed upon the entire city: more especially in view of,

1st. The unequal division of the wards.

2d. The unequal width of the streets.

3d. The unusual number of of angular blocks and lots produced by the original plan of the city.

The cases in New York, Ohio, Wisconsin, and some other states, all show that where special districts were taxed, there were special constitutional provisions and special legislation. —*People v. Brooklyn, 4 Comst. 419; 1 Ohio St. 126; Scovill v. Cleveland, 5 Id. 243; Hill v. Higdon, 10 Wis. 258.*

But if it be urged that the legislature has the power to exercise such special legislation upon special districts,

We say,

1st. That neither the constitutional requirement of uniform taxation nor any rule of apportionment — the essential principle of just taxation — has been complied with.

2d. The legislature has made no provision for "taxing districts."

It has adopted the arbitrary rule of authorizing the common council to make each lot pay for the cost of the improvement in front of it.

This is not a tax, but a forced contribution.

A single city lot surely can neither be called, nor made,

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a district in this sense; much less can the individual owner be termed a community.

But even though the Legislature could do this they have violated the principle of just apportionment, by authorizing the common council to assess the cost of paving the interior spaces produced by the intersection of streets upon each block in such proportion as "*they shall deem just and equitable.*"—*Knowlton v. Sup. Rock Co., 9 Wis., 410, 421; Weeks v. Milwaukee, 10 Id. 242; Att'y Gen'l. v. Winn. L. & F. River, 11 Id. 35; Cooley's Const. L. 508; 25 Ill. 557; See Const. Art. 15, § 13; People v. Mahaney, 13 Mich., 498.*

The injustice of this is made very apparent by considering the difference of the cost of the interior spaces at opposite ends of the same blocks, owing to the difference in width of the cross streets.

According to the rule adopted by the common council therefore the assessment upon the lots on one end of a block would exceed the assessment upon the other end in proportion to the difference in the expense of paving the interior spaces; and frequently the lots upon the different sides of the same portion of a block would bear a tax differing as the width of a cross street would differ on either side of Grand River street.

As to the effect of levying an excess upon the true tax, see:—*Case v. Dean, 16 Mich. 12; 8 Wis. 182; 11 Id. 497; Blackwell on Tax Titles.*

7th. Whatever the power of the legislature, the common council have exercised a power not delegated to them, viz: in assessing upon each lot the actual cost of *paving* in front of it, but following a different rule in assessing the cost of grading, viz: dividing the gross cost between the lots within a given limit; and even in this an arbitrary principle is introduced, because the blocks between two streets varying in width bear a larger share of the grading than they otherwise would.

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And this suggests that the terms "blocks" and "adjacent" have no fixed definition in this act.

All the authorities that justifiy taxing a district assume that the entire cost of the improvement was assessed upon such district by some rule of apportionment; yet here we have three different rules of assessment applied on each one of these assessment rolls.

Had the council the power to assess according to a district, the least they could have done would have been to treat the space proposed to be paved, viz: from First to Eighth street, as a district, and then assessed the gross expense upon it.

In this case they have gone out of the district and taxed lots not benefitted.—*City Charter, p. 59 § 11, 23.*

But we return to our original proposition, and insist that this tax should be borne by the entire city.

It is a public highway, used by the public, of no special benefit to the owner of the lot in front of it, but in point of fact used more frequently by the public at large than by the owner.

In conclusion, then, we say that from a careful examination of the provisions of the constitution it will appear that the various limitations placed upon the action of the legislature regarding this taxing power show the extreme jealousy of the people in conferring upon the legislature any general discretion in imposing unequal burdens upon real estate.

This assessment, then, is unconstitutional:

1st. Because it is not laid upon some community.

2d. Because it is not laid upon a well defined district established by law.

3d. Because it is unequal.

4th. Because no rule of apportionment is observed.

5th. Because it is not based upon a cash valuation.

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G. V. N. Lothrop, and *Moore & Griffin*, for defendant.

This case arises on bill in equity filed to restrain the collection of a special assessment for paving Grand River street

The Common Council of the city of Detroit, by resolution of March 17, 1868, ordered that great thoroughfare known as Grand River street to be paved with the Nicholson pavement.

The contract was made in the usual form April 7, 1868; the work began shortly after, and was completed in the summer. The special assessments were made, and the rolls put into the hands of the City Collector.

The complainants owned lots included in the assessment. To get the pavement was a good thing; to pay for it a disagreeable incident.

Therefore, about the last of September they filed their bill to enjoin the collection of said assessment.

Answer was filed, proof taken, and thereupon a decree was granted according to the prayer of the bill.

The defendants appeal from that decree.

First. The bill makes three distinct points:

1. That the Nicholson pavement was a patented invention held by Smith & Cook, and that in making the contract in question the council were obliged necessarily to reject the bids of others, though lower, and accept those of Smith & Cook.

2. That the work was not done according to the specifications of the contract.

3. That the assessment was simply charging upon each lot the cost of the entire work in front of that lot; or, in other words, that there was no *apportionment* of the expense among the various lots, and that the charter and ordinances in this behalf are unconstitutional.

Second. How stands these points upon the answer and proofs?

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1. The answer admits that the Nicholson pavement is a "patent," but denies that lower bids were rejected for that reason.

The complainants offer no proof against that denial.

2. The answer denies that the pavement was not according to contract; sets up the approval and acceptance of the work by the council; and insists that this is a question that the complainants cannot raise.

The approval of the work by the City Surveyor and acceptance of the same by the council is proven without dispute. As to the quality of the work, in fact, evidence is given on both sides as to the kind of sand used, and as to the condition of the gravel.

3. The method of assessment charged in the bill is denied by the answer, and the only proof on the subject is that of the City Surveyor, who supports the statements of the answer.

Third. As to the objection, that this is a monopoly secured by patent, the question has been decided in this court.

Since that decision the New York courts have reached the same results.

Fourth. As to the character of the work, the complainants in their proof only seek to make two points: 1st, that the sand for the bed was poor in quality; 2d, that the surface gravel was not dried or heated.

As to the first, even the complainants' proof only makes the smaller portion of the sand used defective in quality; even the extent of this is wholly uncertain. Except in one instance, I believe, all the complaint on this subject is confined to the space between First and Third streets.

So as to the surface gravel. No one pretends that the gravel generally was wet. Nor does any one pretend that in any instance the gravel was either so moist or cold that the tar did not adhere or penetrate.

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Again, it is certain that the proof of complainants on this point does not make a general or common case of grievance. Even under the recent enlarged rule of this court as to parties, they cannot sustain their bill on these grounds.

On the other hand, the proof of defendants on both these points more than meets and refutes the evidence of complainants. The sand from the Cass farm is the only sand that any question is made about. And not over twenty-loads in all were brought from that place—Coughlin thinks not over eight.

But finally, with this matter the complainants have nothing to do.

The contract was made with the council; was to be done under the supervision of their agents, and to be accepted by them. This was all done. No collusion with the council is charged or pretended.

Fifth. There remains the principal point made in the case; the constitutionality of the method of assessment.

a. Now we object at the outset, that the case made by this bill on this subject is not sustained. Even if the method used is objectionable, still it is not the method alleged by the bill.

b. As to that part of the assessment, which is for the spaces at the cross streets, this is unquestionably levied upon a principal of proportionate distribution. The rule of apportionment is the superficial area of the lots. This is expressly provided for by the charter.

The common council is authorized to assess the cost of grading and paving these spaces, upon the blocks in such proportions as it shall deem equitable; provided, that each block shall be assessed to the centre of such interior or public spaces each way.—*Rev. Charter, chap. 5, § 103, (11th sub.) p. 55, § 203, p. 119: Ordinances, p. 67, § 17, 20, 21 and 23.*

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This assessment is made separate from the rest; stands on the roll by itself; and can be paid by itself.

So far therefore as this portion of the assessment is concerned I do not see how it is within the supposed constitutional objection;

c. The constitutional objection to the provision in the charter, relative to general paving is, as we understand it, this: that the whole cost of the work done in front of each particular lot is to be ascertained and imposed wholly on that lot; that this has not the essential element of an assessment which implies some proportionate distribution of a burthen common to some given portion of the public.

This seems to have been the view taken by two of the judges of this court in—*Woodbridge v. Detroit, 8 Mich. 274.*

And the validity of such an objection when its exists is approved in—*Cooley's Const. Limit. 501.*

But we venture to submit to the court that such is not the necessary legal effect of the charter provision in question.

The charter as we read it authorizes the assessment of any street to be laid on the lots in front of or adjacent to which the work is done. It may assess this in the way in which a lawful *assessment* may be made. And if an "assessment" *ex vi termini,* implies a proportionate distribution of the cost, this is the method that is to be employed by the council, and the council has "full power and authority to provide it."

Every legislative enactment, when capable of two constructions, one which will uphold it, and the other destroy it, is to receive from the courts the former construction. It is to be presumed that the legislature designed the lawful meaning.—*Cooley's Const. Limit, 184–5: Sears v. Cottrell, 5 Mich., 251.*

We therefore insist that this charter provision is not open to the supposed objection.

The actual method of assessment employed by the city,

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conforms to the idea of a lawful assessment as stated above.

The only cause of inequality in the cost is found in the grading. The cost of the other parts of the work are equal upon each foot front. The cost of the grading is distributed equally on the entire frontage of the block.

But even if the provisions of the charter are unconstitutional, it does not follow that the complainants are entitled to this relief.

1. Nearly all of these complainants, by petitions in writing, asked that this paving should be done. They asked the council to cause it to be done. This in effect was asking that it should be done under the authority and in the mode provided in the charter. This goes beyond an ordinary waiver; it treats this authority as not only not objectionable, but beneficial to the parties.—*Cooley's Const. Limit. 181; Lee v. Tillotson, 24 Wend. 337; People v. Murray, 5 Hill, 468; Baker v. Braman, 6 Hill, 47; Heyward v. Mayor, 8 Barb. 486; Wellington v. Petitioners, 16 Pick. 87; Hingham & Q. Turnp. Co. v. County, 6 Allen, 353.*

2. This paving having been done at their request, they are now equitably estopped to say that the common council had no constitutional power to do it. To hold otherwise, would enable the petitioners to perpetuate a gross fraud. It seems to us that the plainest principles of equitable estoppel apply.—*1 Greenl. Ev. § 2; Plumb vs. Cattaraugus Co. Mut. Ins. Co. 18 N. Y. 392; Brown v. Bowen, 30 N. Y. 519; Manuf. & Tr. Bank, 30 N. Y. 226; Young v. Bushnell, 8 Bosw. 1; Mendlebaum v. N. Am. Mg. Co. 4 Mich. 465: Dana v. Cudney, 13 Mich., 239.*

3. Not only did the petitioners ask this work to be done, but they had full knowledge of the work in all its stages. They waited till the work was done; till the benefit of it was irrevocably assured to them, and then they ask an injunction to restrain the payment for it. What

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color of right have men under such circumstances, to the equitable interference of this court. An injunction is not a matter of right. It will not be granted where it would violate moral equity.

We insist, therefore, that so far as the petitioners are concerned, they have no title to the relief prayed. If they have any *legal* remedies they must be left to them.—*2 Eden. Injunc. 337—note; Roberts v. Anderson, 2 Johns. Ch. 202; Russ v. Wilson, 22 Maine, 207; Burney's Case, 2 Bland. 99; Maryland Savings v. Schroeder, 8 Gill and J. 93; Carson v. Colman, 3 Stockt. 106.*

For these reasons, it seems to us, that the decree below should be reversed and the bill dismissed.

COOLEY Ch. J.

Fourteen tax payers unite in this case to restrain the collection of an assessment levied upon certain property owned by them, fronting on Grand River street in the city of Detroit, to meet the expense of grading that street and paving it with what is known as the Nicholson Pavement. The grounds upon which the bill asks the interposition of chancery to restrain the municipal action are:

First. That the Nicholson pavement is a patent, and the right to lay the same consequently a monopoly, so that there can be no competition for any contract for laying the same, and "no lowest bidder" for any such contract within the meaning of the city charter, which requires all such contracts to be let to the lowest bidder. And the inference the complainants draw is, that any contract for laying the Nicholson Pavement in the city of Detroit is necessarily illegal and void.

Second. That the pavement was not constructed according to the provisions of the contract between the city and the parties who had undertaken the construction of the same, in some important particulars.

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Third. That even if the contract were valid, and fully complied with by the contractors, the assessment would nevertheless be void, because opposed to the constitution of the state, inasmuch as such an assessment can only be levied and enforced under the taxing power of the state, a due and valid exercise of which requires that there should be in every case an apportionment of the burden to be levied, throughout some taxing district, according to some established and uniform rule; whereas, in this case, there was no such apportionment, but each lot owner was arbitrarily charged with the whole expense of the grading and paving in front of his premises, irrespective of the burden upon his neighbors, and in entire disregard of the fundamental principle upon which depends the right to enforce payment of any exaction under the power of taxation.

The first objection taken to the assessment has already been ruled against the complainants in the case of *Hobart v. The City of Detroit* (*17 Mich., p. 246*) and requires no discussion in the present case.

The second objection rests upon evidence which appears to me weak and unsatisfactory, and such as would not warrant the relief prayed for, even if a court of equity had a right to consider the questions which it presents, and to dispose of the case upon them. But I do not think the court has any such right. It is averred in the bill that the common council accepted and approved the work as performed in accordance with the contract, and it is not charged that any mistake or fraud has intervened. The complainants seek by their bill to have us review the decision of the council upon the facts, and to set aside their conclusion if in our judgment the evidence fails to support it. If the courts can interfere in this way, it is difficult to perceive at what point they are to stop, or what is to prevent their taking upon themselves the whole administrative power in

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the municipal governments. But it is plain they have no such authority. So long as the common council keeps within the limits of its jurisdiction, as defined by the constitution and statutes of the state, and its members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the courts have no power to control the exercise of their legal discretion, or to overrule and set aside their judgment; but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all of its inhabitants.

The third objection to the assessment is one of very great difficulty and gravity, and we approach it with no little hesitation and reluctance; admonished as we are of the important public and private interests involved, the irreconcilable differences of judicial opinion concerning it, and the impossibility that any rule which may be accepted as sound in respect to assessments for these local improvements, shall operate at all times with entire justice, equality or equity. In two cases preceding the present, the question now before us has been presented and elaborately argued at the bar and by the bench in this court; and if the conclusions of its judges have not been entirely harmonious and satisfactory, the difficulty has not come from want of careful and patient research, investigation and reflection, but is inherent in the question itself.

In Williams v. Mayor, etc. of Detroit, (*2 Mich. 560,*) a section of the former charter of Detroit was considered, which provided that "the common council shall have full power and authority to provide funds for defraying the expenses of such paving of streets or sidewalks as may be deemed necessary, either by assessment on the owner or occupant of such lot or premises, in front of or adjacent to which such streets or sidewalks may be directed to be paved or repaired, or otherwise as they may direct." It appeared

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that under this section the common council had passed an ordinance prov.ding that "whenever the common council of said city shall deem it necessary to provide funds for defraying the expenses of grading, paving or planking, any alley, avenue or street of said city, or any portion thereof, they shall cause an assessment to be made by the city surveyor, on the owners or occupants of the lots or premises in front of, or adjacent to the avenue or street directed to be graded, paved or planked." Acting under these provisions of the charter and ordinance, the common council caused a certain street to be paved, and in order to provide the necessary funds for defraying the expense thereof, caused an assessment to be made on the owners and occupants of the lots and premises fronting on the street, in proportion to the frontage of such lots and premises. Williams, who was one of the lot owners, filed his bill in chancery to restrain the collection of this assessment, alleging it to be irregular, illegal and unconstitutional. The alleged irregularities and illegalities are not of importance to the present discussion, but the constitutional objections are repeated in the case before us, and demand decision. One of these objections was based upon section eleven of article fourteen of the constitution, which requires the legislature to provide a uniform rule of taxation, and which the court held to be immaterial to the case then at bar, inasmuch as no new rule of taxation had yet been prescribed by the legislature since the constitution took effect, and the constitutional provision was not, the court thought, one which executed itself. It was also objected that the assessment then under consideration was forbidden by section twelve of Article fourteen of the Constitution, which provides that "all assessments hereafter authorized shall be on property at its cash value;" but the word "assessments" in this section, in the opinion of the court, has reference only to the valuation of property for the purposes of taxation, and not to the levying of a tax thereon.

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These were the most important objections which were based upon specific provisions of the constitution, but others were pressed with earnestness, and were overruled. It was insisted among other things that the expense of a public work of the nature in question must necessarily be levied upon the whole city, and that smaller taxing districts are not admissible. The court did not accept as sound the reasoning in support of this position, but on the contrary expressed the opinion that there was no inflexible rule by which assessments for local improvements must necessarily be limited to any fixed political divisions, or any definite extent of territory. Townships, the court well remarked, are divided by the commissioners of highways into road districts in their discretion, for the purpose of assessing and applying the highway taxes, and school districts are organized by the school inspectors within a township, and sometimes partly in two or more townships, and assessed accordingly for district purposes; and no constitutional inhibition has been supposed to have been infracted thereby. These divisions for such and analogous purposes tend to promote the convenience of those more directly interested, and thereby subserve the public interest. And upon the fullest consideration the court were of opinion that clauses cited from the constitution for the purpose of showing that it enjoins a just principle of equality in regard to all public burdens, and prescribes a limit to the exercise of the taxing power; that common burdens should be sustained by common contributions, regulated by some fixed rule, and apportioned according to some uniform ratio of equality, did not forbid the mode of assessment and apportionment which had been resorted to in that case. The principle of equality insisted upon was admitted to be sound, but it was not conceded by the court that it had been violated. It would not require that every public highway and bridge, because constructed for the common use of all the citizens of the state, should be sustained by a general tax upon all the

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persons or property within the state, or that an entire city should be taxed for the construction or improvement of every street within its limits. Nor would it require that every public highway in the state should be constructed and sustained in the same manner as every other. These views of the court were sustained by numerous and apposite illustrations, but it is not deemed important to repeat them here.

By this decision, it will be perceived, the constitutionality of assessments for local improvements upon the prqperty more immediately benefited, and by a ratio of frontage instead of one of value, was fully affirmed; and this was accepted as the settled law of the state, and acted upon in very many instances thereafter. But the case is now assailed, not only for the conclusion at which the court arrived upon the general principle involved, but also because, as is asserted, the learned judge who delivered the opinion overlooked the history of state and municipal legislation upon the subject, and especially important provisions of the municipal ordinances which must have compelled a different conclusion respecting the validity of the assessment then in question. It is said with truth, that the early statutes empowering the city authorities of Detroit to cause the streets to be improved at the expense of adjoining land owners, contemplated this being done, not by an exercise of the power of taxation, but under and in pursuance of another sovereign power which is governed by very different principles; to wit, the police power of the state. And it is also asserted that some portion of the ordinances of Detroit in force at the time the assessment in question in *Williams v. the Mayor, etc.* was made, plainly forbade such an assessment as was there made, and would have required the court, on principles asserted in the opinion, to hold the assessment void, had they not been altogether overlooked.

Municipal ordinances are not general laws, and cannot be judicially noticed by courts except so far as they are

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in proof before them. We have no means of judicially knowing that any portion of the ordinances of the city of Detroit were before the court, in *Williams v. the Mayor, etc.*, except what is mentioned in the opinion. Neither have we any means of informing ourselves what ordinances were then in force, except by entering upon an inquiry of fact extrinsic the present record. Any such inquiry is foreign to our functions as an appellate court, and I must decline to enter upon it. I shall assume, until the contrary is proved by the record, that the court in the case referred to was fully possessed of the facts, and that the only question now of importance to us is, whether the court properly applied to those facts the law of the case.

The charter of Detroit was revised in 1857. By chapter 5, § 22, sub. 11 of the Revised Charter, the common council are empowered "to establish, open, widen, extend, straighten, alter, vacate and abolish highways, streets, avenues, lanes, alleys and public grounds or spaces within said city; and to grade, pave, repair and otherwise improve the highways, streets, avenues, lanes, alleys, interior public spaces, or created by the intersection of streets, cross-walks and sidewalks in said city, with stone, wood, brick or other material; and the common council shall have full power and authority to provide for paying the costs and expenses thereof by assessment on the owner or premises in front of or adjacent to which such highways, streets, avenues, lanes, alleys, interior or public spaces, cross-walks, or sidewalks may be directed to be graded, paved, repaved, or otherwise improved: Provided, That the cost of such grading, paving, repairing or improving such interior or public spaces, shall be assessed to each block in such proportions as the common council shall deem just and equitable: Provided further, That each block shall only be assessed to the center of such interior public spaces each way; which assessment shall be a lien until paid, on such lot or premises in front of or adjacent to which such

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grading, paving, repairing or improving, may be directed, and shall be collected in the same manner as other assessments or taxes imposed by authority of the common council. Whenever such grading, paving, repairing and improving shall be at the intersection of two or more avenues or streets, and in front of or adjacent to the point of a triangular block, such portion of costs and expenses thereof shall be assessed to and paid by the city of Detroit, as the common council shall deem just."

Section eight, of chapter eight, of the same charter also provides that "The common council shall also have power from time to time to levy, assess, and collect a tax or assessment on all lots, premises or subdivisions thereof, sufficient to defray the expenses of grading and paving, graveling, macadamizing or planking any highway, avenue, street, lane, alley, or crosswalk in said city, in front of or adjacent to such lots, premises or subdivisions thereof, and of putting curb stones and culverts therein; which tax or assessment shall be credited to the street paving fund: Provided, however, that such tax or assessment shall not in any one year exceed in the aggregate the sum of $50,000: such grading, paving, macadamizing, planking and putting in of curb stones, shall be commenced and completed, and all contracts therefor shall require the same to be commenced and completed within the seven months next preceding the first day of December."

With these provisions of the charter in force the common council, in 1859, passed an ordinance directing the grading and paving of a certain portion of Fort Street, and also directing the collection of the expense thereof from the owners of the abutting premises, upon no other principle of apportionment than that each lot owner should be charged with the whole expense of the improvement in front of his premises. The common council assumed that the provisions I have quoted warranted and required the adoption of this mode of imposing and collecting the ex-

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pense; but Mr. Woodbridge, upon whom the burden mainly fell, assailed it as unwarranted and unconstitutional, and the result was the injunction suit of *Woodbridge v. Detroit* which, as passed upon in this court, is reported in *8 Mich. Rep. 274*, and in which the whole system of local assessments for local improvements was carefully investigated, both on principle and on authority.

By the report of the case of *Woodbridge v. Detroit* we discover:

First: That a majority of the court were of opinion that the provisions of Sections 11 and 12 of Article 14 of the Constitution, which are relied upon in this case as requiring a uniform rule of taxation, and an assessment upon property at its cash value in these cases, have no application to taxes or assessments for such local improvements as the one now in question.

Second: That a majority of the court were also of opinion that it was not unconstitutional to assess the expense of local improvements upon the adjacent property, upon some other basis than that of valuation, provided the principle of apportionment which lies at the foundation of the taxing power, was recognized in the assessment. In this particular, the case is in accord with the previous case of *Williams v. the Mayor, etc.*, and the opinions delivered lead us to the conclusion that had the assessment in the last case been made on the same principle as the one in the case of *Williams*, and under similar state and municipal legislation, it would have been sustained as constitutional.

In two successive cases, therefore — the last disposed of after there had been an entire change in its members, with a single exception — it has been decided by this court that local assessments for local improvements without regard to valuation, are admissible under the constitution. A due respect to our predecessors, I think, and to uniformity and stability in judicial action, demand that we shall recognize

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this point as no longer open to controversy. All the arguments pressed upon us with so much earnestness by counsel, to convince us of the injustice of the system, and all the illustrations of the hardship of particular cases, may be addressed with much force to the legislative department, but addressed to us they are appeals alike against the judgment of the legislature in point of policy, and against the judgment of our predecessors in point of constitutional law; and we cannot suffer them to have weight without disregarding principles which have become axiomatic. The hardship of particular cases is no constitutional objection to any system of taxation; and if it were, it would be easy to defeat the best arranged scheme which human ingenuity has yet devised. And the importance of adhering to judicial decisions, except when unmistakably wrong and mischievous, can certainly require no illustration at our hands.

In the *Woodbridge* case, it was assumed by counsel and by the court that the provisions of the revised charter of Detroit which I have quoted would, if constitutional, have justified the common council in the ordinance then in question. My brothers, Christiancy and Campbell, however, held that the system of assessment—if such it can be called—which was there adopted, was unconstitutionaland void, inasmuch as it imposed the burden in a manner which disregarded the fundamental principles of taxation; and without any apportionment whatever compelled every lot owner, according to a standard fixed, and at an expense assessed by the public authorities, to put the street in front of his premises in condition for public use. I agree fully with those judges, that there is nothing in the principles of taxation which will warrant this course. I also agree with them that these local assessments for the improvement of streets are made in the exercise of the power of taxation, and cannot be justified on the ground of being mere regulations of police; and that consequently those cases in which have been sustained police regulations, compelling

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each lot owner to improve and keep in repair the sidewalks in front of his premises, without reference to any taxing district, or any apportionment of the burden, are no authority for an ordinance like that in question in the *Woodbridge* case.

After the *Woodbridge* case was decided, the common council appear to have shaped their action with some reference to avoiding the difficulty suggested by the opinions of the two judges referred to. Assuming that the provisions of the charter, which I have quoted, did not require, though they might by their terms, if valid, permit the common council to impose upon each lot owner the expense of the improvement in front of his premises, irrespective of any taxing district, or any apportionment of the expense of the improvement, and that the council, under those provisions, were at liberty to establish taxing districts for these improvements, and adopt some system of apportionment in assessing the expense upon the abutting lots, they have since, we are informed, levied these local assessments according to the principle approved in the case of *Williams*, and they claim that the one now in question, is justified by that case, and by the cases relied upon by the court in deciding it.

It is somewhat remarkable that the city authorities, after being notified as they were by the *Woodbridge* case that in the opinion of the judges, as well as of the counsel employed on both sides, the city charter laid down an absolute and arbitrary rule for defraying the expense of improving the streets under which there could be no apportionment, and that one-half of the court regarded such rule as unconstitutional and void, and after having themselves abandoned all attempt to enforce it further, and fallen back upon a system which had been previously sustained by the court, should nevertheless have failed to procure the proper amendments to their charter, and should have gone on for a

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series of years levying and collecting assessments on one system, under a statute which was conceded in the previous litigation to establish a different one. It would seem that the doubtful validity of their action must have been constantly present to th ir minds, and it can hardly be doubted that a simple request to the legislature to change the statute to correspond to the system they had finally settled upon would have secured such legislation as to render the validity of these assessments unquestionable. It is always a source of regret when a court is compelled to hold municipal action invalid on technical grounds, where the action itself has wronged no one, and where the imperfection consists only in a failure to procure at the outset the proper authorization, which would have been given if asked for. It is much more agreeable to affirm the doings of municipal authorities where they have acted in good faith, than it is to annul them for imperfections; but cases, unfortunately, will sometimes occur where the court has no alternative.

It will not be denied that a valid assessment by municipal authorities requires a valid statutory provision to warrant it; and if the provisions of the city charter under which this assessment has been made will not justify any such assessment, but require a different mode of imposing the burden, the city authorities have not escaped the difficulty which was made apparent in the *Woodbridge* case, by adopting a basis of taxation which the legislature might constitutionally have sanctioned, but have not. The counsel for the city in the present case concede this position, but they insist that the provisions of the city charter which were considered by the court in the case of *Woodbridge*, and under which the present assessment has been made, were incorrectly construed in that case, and that they do not, as was then assumed on all sides, require that each lot shall be considered by itself, and that the expense of improving the street in front of it shall be imposed upon the owner. On the contrary, they claim that those charter

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provisions only establish a general principle that the expense of these local improvements shall be assessed upon the abutting or adjacent property, while they leave the city authorities at liberty to adopt any such system of assessment and apportionment within this principle as will consist with the general ideas which underlie the taxing power. And they also insist that upon this question of construction the case of *Woodbridge* cannot be regarded as a precedent, inasmuch as it was not there discussed, and the conclusions of the judges must have been the same in that case whether the construction there conceded to be the true one was adopted, or on the other hand, the one insisted upon by the city in the present case.

If this question were entirely a new one, I am very much inclined to think that the view now taken by the city authorities ought to be adopted, on the familiar principle that where two different constructions of a statute are possible—the one of which is consistent with the constitution, and would render the legislative act valid, and the other is inconsistent with that instrument, and would render the act nugatory—the one first mentioned is to be preferred as the one presumptively intended by the legislature. (*Dow v. Norris, 4, N. H. 17; Newland v. Marsh, 19 Ill., 384.*) But my brethren who participated in the decision of the *Woodbridge* case have since seen no reason to change the view they then took of the charter provisions in question, and it is impossible to deny that that view is one which very naturally presents itself to the mind on reading those provisions. It is impossible, therefore, to sustain the assessments now in question before us, and with some hesitation, I concur with my brethren in their construction of the statutory provisions.

These conclusions render it unnecessary to determine whether the assessment is in all respects regular, and such as could have been sustained had the charter been construed by the court, as it was by the common council; and

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I do not propose to discuss that question. It may not be inappropriate to suggest, however, inasmuch as the common council have now procured an amendment to their charter, under which it is to be presumed that new assessments will be made, that the forms which are adapted to such a proceeding as was had in the case of *Woodbridge* are at least inappropriate to such an one as is claimed to have been made in the present case, and that a proper and orderly course of proceeding would require the council, by preliminary legislative action, to establish the taxing districts, instead of leaving that to the surveyor and relying upon the resolution approving his assessments as establishing them. I do not, however, say or intend to intimate that the present assessment would have been void on either of these grounds, nor that there would be any valid objection to it on constitutional grounds, because of there being, in terms, no apportionment of the expense of the paving tax. The expense of the paving—unlike that of the grading—was uniform throughout the districts, and a mathematical calculation to apportion it would have reached precisely the same result as that adopted by the Surveyor without such calculation, when he charged upon each lot the expense of paving in front of it. Constitutional principles for the protection of person and property are not based upon nice distinctions in the modes of administration, but they regard the substance of things rather than the form. We have had occasion heretofore to declare that a thing unconstitutional in its essence was not to be sustained simply because it had assumed a constitutional guise; *Price v. Hopkin, 13 Mich. 318; Groesbeck v. Seeley, Ibid. 329;* and on like reasons we should not be likely to declare an assessment which was proper in substance to be unconstitutional, because an unnecessary mathematical calculation had not been gone through with to reach a result which was already possessed before the calculation was begun.

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It appears from the record that the complainants Frederick Motz, Thomas Cranage, Peter Yost, Jenison F. Glazier, Joseph Carnes, Andrew Peoples, James S. Peters and Charles Fitzsimons, before any contract had been entered into by the city for the grading and paving of Grand River street, or any action taken in reference thereto, joined with other property owners upon the street in a petition to the common council that that body would cause the street to be paved. It was in compliance with that petition that the improvement was ordered; the contractors knew of it, and may be supposed to have placed some reliance upon it while the work was progressing; and inasmuch as no objection appears to have been made by any of the petitioners to the contract made, or to any of the action of the contractors, or of the common council until the work was completed, the contractors had reason to believe they were engaged in the fulfillment of the wishes of the petitioners, and might rely upon their making payment without question when the contract was performed. Both the contractors and the petitioners—all of whom are residents of the city—knew that, by the city charter, the city was not and could not be made liable for the cost of the work, but that the contractors must rely upon the special assessment exclusively. There is no claim now on the part of these petitioners that the assessment of the expense of the improvement is made on any different basis from that contemplated by them when the petition was signed. Under these circumstances they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment, and to have impliedly, at least, consented that such an assessment should be made. Whether, therefore, the assessment is legally valid or not, there is not the least ground on their part for claiming the interposition of a court of equity by its extraordinary process of injunction to stay the collection of the assessment. Their remedy, if any, is strictly legal,

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and the decree of the court b
reversed, and the bill dismiss
This conclusion in no degree
ants insist is their sacred con
but it precludes their resort t
when the only wrong they allege is that their petition has
been complied with.

The other complainants are entitled to an affirmance of the decree so far as it enjoins the collection of the expense of grading and paving in front of their respective premises. The decree went further, however, and enjoined the collection of the expense of grading and paving the several interior spaces. In this particular it appears to be erroneous. There is no specific complaint in the bill that the grading and paving of these spaces was not done in conformity with the constitution and the provisions of the city charter, except so far as the allegation that this species of pavement was a monopoly, and that the work was not done in compliance with the contract, may have a bearing in that direction. There is therefore, perhaps, no occasion for our considering the question of the validity of the assessments for this work on any other grounds. It is evident, however, that the charter, together with the ordinances, in respect to the cross walks and these interior spaces, does establish taxing districts, and their provisions on that subject are not liable to constitutional objections under the views hereinbefore set forth. The decree, therefore, so far as it enjoined the collection of the assessments for the grading and paving of the interior spaces is erroneous, and should be reversed. As each party succeeds, in part, no costs should be awarded to or against these complainants, except as above directed.

GRAVES J., concurred.

CAMPBELL J.

The principal questions in this case relate to the validity

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the mode of assessment for paving streets, provided for by the charter and ordinances of the city of Detroit, and to deviations from the appointed method which are alleged to have occurred.

As under the laws in question assessments are declared to be liens upon land, and are to be enforced by sale of the land, they must be made in strict conformity with the laws and ordinances in order to have any validity whatever. And if not so made the common council could not make them valid. This was the view expressed by Judge *Green*, in *Williams v. Mayor of Detroit, 2 Mich. R. 575*, where he says: "It is contended by the defendant's counsel, that, although the provisions of the ordinances are not complied with, yet, if the common council by resolution ratify the proceeding, such resolution has the power and effect of an ordinance or by-law, and repeals or modifies *pro tanto* the ordinance which has been violated or disregarded. This latter assumption is wholly inadmissible as applied to those ordinances which affect the substantial rights of individuals. The common council, in making general ordinances, exercise a legislative power. The making of an assessment roll, and apportioning a tax under the ordinances, is a ministerial duty, and the confirmation of the assessment partakes more of the character of a judicial than a legislative act. We must, therefore, regard the ordinances relating to assessments, as binding and obligatory upon the corporation as upon the individual citizens."

This not only negatives the validity of the supposed ratification by the common council of the illegal assessments in the present case, but it also indicates with equal clearness, that if the court in that case had compared the by-laws under which the assessment there had been made (and which are referred to, but under an error in the opinion), the proceedings could not have been maintained on any hypothesis. It will become necessary to refer to the several charters and ordinances which have been before this court in the several

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cases heretofore considered, in order to see the precise condition of the law. And it is very much to be regretted that they were not collated on the argument of those cases. In the *Woodbridge* case the construction which had been given to the charter since the organization of the city was very naturally conceded by every one to be true; but if it had then been contested, its correctness would I think have been made manifest, and we should have been saved the trouble of considering the present controversy.

A careful examination of the statutes on the subject of street paving will show that there has been no change in the phraseology of so much of the charter as provides specifically how the expense of paving is to be charged, since the first charter of 1827. It will show also that during this entire period (except for an interval when sidewalks were not authorized to be built by assessment unless included in the term "streets"), the pavement of streets and sidewalks has been provided for by the same identical means, and that in every case the law and the ordinances have charged each lot separately for all work done in front of it, and have expressly excluded any idea of apportionment except for cross-walks and public spaces. There is not in either law or ordinance any reference or allusion to assessment by feet frontage as a measure of proportion, but it is the lot, small or great, which pays its own paving, without any reference to its neighbors. And if there should appear any room for ambiguity, when a single clause is read by itself, it ceases when all are examined together.

The power to assess for paving first appears in section 20, of the charter of 1827, in these words: "The common council shall have full power and authority to provide funds for defraying the expenses of such paving of streets or sidewalks as may be deemed necessary, either by assessment on the owner or occupant of such lot or premises, in front of, or adjacent to which such streets or sidewalks may be di-

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rected to be paved or repaired, or otherwise as they may direct." The words "or otherwise" were stricken out in 1855.

Before proceeding further it will be noted that the streets and sidewalks are to be paved upon the same principle. It will also be perceived that the assessment is not spoken of as one to be apportioned among the owners or occupants of the several lots which may be on the line of the improvement, but the owner and the lot are in the singular number, and the assessment is individual and not distributive. As already intimated, this alone would not be conclusive, but it is made so by other considerations. But it is clear from this section alone that no assessment would be valid for a sidewalk under this law which would not be valid for a street. And sidewalks have, whether rightly or not, always been held within the police power, without reference to taxation.

It will be observed that these assessments were personal, and did not bind the land. It does not appear that any compulsory street paving was ever done under this clause alone. But in 1841 the subject seems to have become more prominent, and the law was amended by making these assessments liens upon the land. *L. 1841. p. 201.* The same statute authorized the common council to permit any person or persons to pave the sidewalk and street in front of the premises owned or occupied by such person or persons, and provided that when done, they should not be "assessed or compelled to pay any road or highway tax on the premises in front of which such pavements shall have been made," so long as they should keep the same in repair to the satisfaction of the common council. — *L. 1841, p. 199.*

This, when taken with the other provision, shows that it was intended to make each lot owner pave both street and sidewalk in front of his own premises, and

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keep both in repair when so paved. The effect of this would be to make no provision for such portion of the street as was not in front of any lot — or, in other words, the crossings. These could only be provided for under the general "or otherwise" clause. It will be seen that in making their ordinances the council gave at once a practical construction which has never been changed, and which, immediately after this court failed to decide the *Woodbridge* case, was renewed and reiterated precisely as before. These ordinances were the ones in force when the case of *Williams v. The Mayor* was decided, and the court seems entirely to have misapprehended the argument of irregularity which was based upon them.

The ordinance there quoted (on page 568), was section 16, chapter 17, of the revised ordinances of 1848, which ordains that "whenever the common council of said city shall deem it necessary to provide funds necessary for defraying the expenses of paving or planking any avenue or street of said city, or any portions thereof, they shall cause an assessment to be made by the city surveyor on the owners or occupants of the lots or premises in front of or adjacent to the avenue or street directed to be paved or planked." Section 17 provided that the expense of paving the cross streets should be apportioned so that each block should be assessed to the center of the cross street each way. This section has been substantially perpetuated in the present charter.

The court, assuming that section 16 was the only section bearing upon the other assessment, held that any reasonable assessment made by the surveyor and accepted and approved by the council, would be conclusive. But, as already seen, they held further, that if there had been any ordinance directing how this assessment should have been made, it would have been necessary to follow it.

The very next section, (section 18,) which was over-

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looked, provides that "the manner of making said assessments and all other proceedings in the premises, shall be the same as are required under the provisions of sections 6, 7 and 9 of this chapter, except that the notice to be given by the city clerk, under the provisions of section seven, shall notify persons to be assessed that they are about to be assessed to defray the expenses of paving or planking the street or streets adjacent to certain premises owned or occupied by them," etc.

Section 19 provides that, "If the owners or occupants shall omit to pave or plank said avenues or streets in front of, or adjacent to their respective lots or premises, or pay their proportion of the assessment for paving or planking any cross street or avenue," a warrant may issue for its collection. This is the sole authority to collect.

Here the distinction is made between the paving which belongs to the lot absolutely, and that which is proportioned, and which relates only to public spaces. A reference to the sections 6, 7 and 9, which contain the directions for assessing, will make this still plainer.

Section 6 directs that in making out the assessment roll, the list shall be made "describing by itself, with sufficient accuracy, each lot or portion of a lot owned by any one person, or company of persons, and also the names of such owner or several owners." It then provides that "said City Surveyor, shall also, in as accurate a manner as possible, ascertain and, in said report, set forth the space or number of square yards or feet paved or planked, or to be paved or planked, and the quantity of curbing placed or to be placed in front of or adjacent to the lots or premises owned or occupied by any one person or set of persons, the sum of money which such person or set of persons shall be assessed at, and pay for such paving or planking; which report the said City Surveyor shall present to said common council." Sections 7 and 9 relate to the notices and proceedings for confirmation.

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Section 24 imposes the liability to repair all paved streets and sidewalks on the "owner or occupant of the lot or premises in front of or adjacent to such parts of said street or sidewalk as require repairing," and subjects him to an assessment for the expense if he omits it.

These provisions are susceptible of only one construction, and that is, that for street as well as sidewalk paving each lot is separately liable for the work done in front of it; and had they been brought to the attention of the court in the *Williams* case, the reasoning and rules adopted in the opinion show the conclusion arrived at on the law points would have been different.

In that case there was some reference to the subject of grading, but the court did not pass upon it, as there was a dispute of facts. The common council, however, soon after legislated on the subject, by including, by express terms, the expenses of grading with paving, whenever streets were to be improved, instead of leaving the question open to misapprehension. The revised ordinances of 1855 made this change by the insertion of the proper words, and amended section 19, before quoted, so that the first portion of it reads as follows: "If the owners or occupants shall omit to grade, pave or plank said avenues or streets, in front of or adjacent to their respective lots or premises, or pay their proportion of the assessment for grading, paving or planking any cross street, avenue or alleys, so that the expense of all grading done shall be assessed upon the property fronting the same, within such time as the common council may, by resolution, direct, then the said common council may issue their warrant," etc. — *Charter and Ord. 1855, p. 139.*

This was the state of things when the paving in Gov. Woodbridge's case was ordered and made, and I think there is no room for questioning the correctness of the construction put on the laws and ordinances in that case by the court.

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When that case was decided, the ordinances continued in force, but the present charter had superseded the old one. By chapter 11, section 8, of this revised charter, which was prepared by the city authorities and adopted at their request by the legislature, it was declared that "All ordinances, by-laws, regulations, resolutions and rules of the common council of the city of Detroit, now in force, and not inconsistent with this act, shall remain in force until altered, amended, or repealed by the common council, under this act, and after the same shall take effect."

At that time, therefore, these ordinances themselves received all the sanction of laws, so long as they should remain unaltered, and required no re-enactment.

This new charter only differed from the charter of 1827, so far as the points now under consideration are concerned, by omitting the words, "or otherwise," and by including in terms the grading with the paving, and other expenses which were to be chargeable on each lot. The provision for cross streets and public spaces was continued as before, with the same amendment to cover grading. *Chapter 5, sec. 22, subd'n 11.* It also retained the exemption of each lot owner from street taxation, so long as he should keep the pavement in front of his premises in repair. (*Subd. 18.*) By a singular oversight, no provision was made for compelling the building of sidewalks, or levying assessments for that purpose, unless they could be included in the provisions for street paving. Owners might be permitted to build them, (*Subd. 18*) but could not be compelled, unless they came within subdivision 11, which seems to have been regarded as covering them, and which in building walks was still, as formerly, followed in the by-laws and ordinances for that purpose. An entirely new provision was made in 1865 (*L. 1865, p. 679.*)

In August, 1860, a few months after the *Woodbridge* case was before this court, the common council amended and consolidated the former ordinances concerning sidewalk and

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street paving, and in doing so, followed the views of *Manning J.* and retained all the distinctive features of the old system. *Chapter 28, section 18,* in directing how the assessment shall be made, requires the roll to describe "by itself, with sufficient accuracy, each lot or portion of a lot owned by any one person or company of persons" and to set forth, in separate columns, the space or number of yards or feet graded or to be graded, the space or number of square yards or feet paved or to be paved, the quantity of curbing placed or to be placed, and the quantity of tile drains placed or to be placed in front of or adjacent to the lots or premises owned by any one person or set of persons, the sum of money which such person or set of persons shall be assessed for said work, and also five cents for each description to defray the expense of making such assessment." The same section requires the surveyor to make a "separate assessment" upon one quarter of each block for the public spaces, &c. to be laid by superficial area. These rolls are referred to as separate rolls, and are made upon a different basis. *Sec. 17, p. 66-7; Rev. Ord. 1863.* Whether they can be combined properly is worthy of some consideration, but is not material in my view of the case.

The assessment rolls now before us purport by their heading to set forth the amount of paving, grading, curbing, drains, &c. in front of each lot. The report and certificate of the surveyor attached, declares them to have been made in accordance with the ordinance. Even if the council could, without an ordinance, vary the mode of assessment, and even if the charter did not require this method, the approval of rolls in this form, and thus certified, cannot be construed as an approval of something different. These proceedings cannot rest in parol, and if the surveyor did in fact vary from the ordinance, he did so without authority, and has not so reported. The rolls certify otherwise.

I have been unable to discover anything to authorize

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any different construction of the charter from that given in the *Woodbridge* case, and the ordinances are equally explicit. If that construction is correct, then the proceedings in this case, were all within the mischiefs referred to there, and I adhere to the views I then expressed, that they lack the elements of legitimate taxation.

There are difficulties which, so far as my individual opinion is concerned, would not be removed by a mere linear or superficial apportionment, not regulated by some less vague principle than that contemplated by the argument on which the defence is based. I shall indicate them as briefly as I can, without attempting to go into any extended discussion.

I have never been able to comprehend why the constitutional clause declaring that all assessments shall be on property at its cash value is not applicable, as it certainly is in terms, to these taxes. The equalization by the state board only affects the relative quotas of counties, so as to adjust their taxation for state purposes. It has nothing to do with particular assessments, and there is nothing in the constitution which prevents new and separate assessments for every separate purpose. Uniformity is required in the distribution of each tax, but the city or the village could have independent rolls for municipal purposes without violating any rule. The highways in existence when the constitution was framed greatly outnumbered the city streets, while there were not in this city any continuous street pavements, and probably there did not exist a dozen blocks of paved streets in the whole state. If local assessments had been made elsewhere on other than pecuniary assessments, it is nevertheless true that there has never been a time when more complaints were made concerning their injustice, and there was no general acquiescence in their legality. On the other hand, state, county, town and village roads had always been made and kept up by assess-

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ments or taxes levied on the basis of the ordinary rolls, and collected in districts varying in size from the county to the smallest road districts, which could be made as large or as small as might be desired. There was no inveterate custom to interfere with. All unpaved streets in the city are graded as well as repaired and kept in order under this very charter now by taxes raised on the valuation. Bridges are built on the same basis. Pavements are repaired everywhere, and are built in front of city property, sewers are constructed, streets are opened, and all manner of buildings erected by such taxes. There is, therefore, no incongruity in the theory, and no one has been able to discover any better means of equalizing burdens within either large or small districts, while such monstrous inequalities as render the other system in many cases not only oppressive but destructive, could never arise under this. Nothing can approach so nearly to absolute uniformity; and I feel convinced that the construction which seems to be regarded as sanctioned by judicial opinions, if not by settled decisions, might better have been otherwise.

But assuming this to be fixed, and that some other rule than valuation is to be followed, it must, at least, be a rule which makes the same work cost no more to one person than to another similarly situated. Where no district has been laid out in advance, then it seems to me that every work embodied in a single line and built under one contract, must be regarded as an entirety, and its cost assigned to some adjacent and reasonably regular space; and if frontage or any other basis is adopted, the cost of the entire work should be spread along the entire line equally No amount of argument can give plausibility to the claim that two adjoining lot owners should pay different shares of paving tax because one end of a block is crossed by a narrow street and one by a wide one, and still less that lots opposite each other should do so merely because op-

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posite blocks may be of very different lengths. Nor is there any possible uniformity in a rule which requires a part of the expense of paving a street to be charged by frontage and another part by superficial area, simply because the work is not all in front of private property. The rule of taxing by frontage without reference to depth is purely arbitrary, for it makes the tax depend entirely on ownership and not on the position of the property taxed. But when this is mixed up with a tax by area depending upon the size and shape of blocks, and the number of cross streets, and differing in every block along the line, it becomes so utterly irregular that there is no uniformity or proportion in it.

I am therefore of opinion that the assessments are not sustainable on any principle whatever. And I do not deem it important to examine into the minor questions of informality.

CHRISTIANCY J.

I concur with my brother Campbell, in the construction of the charter, and his review of the course of legislation, and of the ordinances of the city; and with him I am also of the opinion that if the ordinances in force at the time the taxes referred to in *Williams v. the Mayor*, were assessed, had been fully brought to the attention of the court, and properly considered, the conclusion arrived at in that case must have been different.

In all other respects I concur in the opinion of the Chief Justice.

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ALIMONY.

See DIVORCE.

AMENDMENTS.

Chancery Rule 21. Chancery Rule number twenty-one has no application to amendments at the hearing of a cause.—*Goodenow v. Curtis, 298.*

As to power: See PRACTICE IN CIRCUIT COURT, 4.

APPEAL.

As to dismissal: See EQ. PL. AND PRAC. 4.
As to review of Sup. Ct. decree: See DECREE.
As to dismissal: See EQ. PL. AND PRAC. 1, 2.
As to Absentees: See NOTICE OF TRIAL.
As to motion to dismiss: See WRIT OF ERROR.
As to Commissioners: See DECLARATION.

APPRAISAL.

Of Railroad land: See EVIDENCE, 34.

ASSESSMENT.

As to description: See DEED, 3, 4;
And See EJECTMENT, 1, 2.

ASSIGNEE.

As to suit in his own name;
See CHOSE IN ACTION.

ASSIGNMENT.

1. *Assignment of property by reference to schedule.* When debtors make an assignment to a trustee for their creditors, of their property as described in a schedule attached, only such property passes as is there described.—*Ryerson v. Eldred, 12.*

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2. *Assignment treated as void by the parties: Rights of a purchaser from the assignee.* When an assignment, ostensibly for the benefit of creditors, was treated as void by all the parties thereto, and A., one of the assignors, entered into a contract with the others, with the knowledge of the assignee, that they should convey a certain piece of the joint property to him, and that in consideration thereof, A. should pay the joint debts, and also make certain payments to the other assignors, and under that contract he went on and made large payments to creditors, and improved the property: *Held*, that B. and C., who were not creditors, and who, with knowledge of this contract, bought the property described therein from the assignee and from such other assignors, were bound by the contract, and might be compelled to carry it into effect by deeding over to A. the rights acquired by their purchase.—*Ibid.*

3. *Accounting in such case.* A. in such case should account to B. and C. for such moneys paid by them on their purchase as had been actually applied on the joint debts which A. by his contract was to pay, and B. and C. should account to A. for the rents and profits of the land for the time they had occupied it under their purchase.—*Ibid.*

4. *Assignment of right of action for tort: General rule: Exceptions.* As a general rule, the right of action for a tort is not the subject of assignment. But the rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him.—*Final v. Backus, 218.*

5. Rights of action for such torts as survive to the personal representatives may be assigned so as to pass an interest to the assignee, which he can enforce by suit at law.—*Ibid.*

6. The assignee of a demand, originating in favor of an assignor, for the conversion of logs obtained by a trespass upon certain land granted to the assignee, may bring trover in his own name.—*Ibid.*

Of land contract: See CHOSE IN ACTION.
Of legal title to lands: See EJECTMENT, 5.
Of error in criminal cases: See CRIMINAL LAW, 7.
Of error: See SPECIAL ASSIGNMENT.

ATTACHMENT.

Effect of discontinuance on sureties' bonds: See BOND, 1.

BANK CHARTER.

See STATUTES.

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BIGAMY.

As to presumption of innocence: See EVIDENCE, 1.

BILL IN CHANCERY.

As to description of premises in: See DESCRIPTION, 1.

BILL OF EXCEPTIONS.

Trial before referee: Bill of exceptions: Special assignments of error. When exceptions are taken on a trial before a referee, the bill of exceptions, when settled, performs the same offices for the purposes of a writ of error, as a bill settled, by the Circuit Judge, when the case is heard in open Court. All the reasons requiring special assignments of error in one case apply equally to the other.—*Altman v. Wheeler, 240.*

See JURISDICTION.

BILL OF REVIEW.

Of decree of Supreme Court: See EQ. PRACTICE and PLEAD. 3; And see DECREE.

BOND.

1. *Attachment suit: Discontinuance: Sureties on bond: Parties* An attachment suit was commenced against three defendants. To prevent the removal of the property attached, the usual statutory bond was executed. On the trial, the plaintiff, under rule 71, discontinued as to two of the defendants, and proceeded against the third, and obtained judgment.

   In a suit subsequently commenced upon the bond, defendants objected to a recovery on the ground that the discontinuance as to the two defendants released the sureties on the bond.

   Held, that the bond given by the sureties must be considered as tacitly referring to the suit as *then* constituted in respect to parties, and not as it might *afterwards* be modified by the plaintiff.—*Andre v. Fitzhugh, 93.*

2. Such a change of parties, as made in this case, would not only transform the cause of action from a joint to an individual one,

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but would necessarily alter the operation of the contract of the sureties, and without their consent.—*Ibid.*

3. *Bond to pay debts: Official bonds: Penalty: Voluntary payment.* The obligor of a bond, conditioned to pay all the debts of a certain firm, paid, before suit, the debts of said firm to the amount of the penal sum.

In a suit upon said bond to recover, for the debt in excess of said penalty; *held*,

1. That the rights and obligations of the parties depended wholly upon the bond.

2. That if a party choose voluntarily to perform his obligations to its full legal extent, it is equally as meritorious and effectual as though made through a suit at law.

Such a bond is a private contract, the chief object of which in including a penalty, was to fix the limit of the liability. The legal effect as to the extent of liability, is that of a covenant, without a penalty, to pay the debts of said firm to the amount of said penalty.—*Spencer v. Perry, 394.*

4. The obligations imposed by official bond to pay over monies &c., are not created by the bond, but imposed by law, while the bond is but a collateral security for the performance of a legal obligation.—*Ibid.*

As to sureties not justifying: See WRIT OF ERROR.
As to liability of townships for: See TOWNSHIPS.

BOUNDARIES.

See DEED 3.

BOUNTY.

As to Minors bounty: See AGENCY.

CANAL.

As to Sault St. Marie Canal: See RIPARIAN RIGHTS.

CARRIERS.

1. *Warehousemen.* In the absence of any usage, special circumstances, or agreement, the liability of Railway Companies for goods in warehouse awaiting delivery is that of common carriers. *Buckley v. G. W. R. R. Co. 121.*,

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2. *Suitable cars: Subordinate officers.* Where the contract of a rail road company to transport certain horses, was silent as to the fitness of the cars to be furnished: *held*, in an action for damages, that the company were responsible under their common law liability, though limiting the common law liability in some particulars, for injuries resulting from defective cars.—*G. W. R. R. Co. v. Hawkins*, 427.

3. The obligations of the carrier to furnish suitable cars, fit for a particular purpose, is absolute without reference to the fitness or fidelity of agents or officers, subordinate or otherwise, unless plaintiff, with notice of the defect, assented to their use.—*Ibid.*

CARS.

See CARRIER, 3.

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Beach v. Botsford, 1 Doug. Mich. 199 ..... " 239
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CASE MADE.

1. *Repeal of law, for review of.* Where a case made for review upon the facts appears to have been settled after the law authorizing such review was repealed, the Court cannot consider it.—*Heinbach v. Weinberg, 48.*

Where writ of error is sued out, effect of: See WAIVER.

CENTRAL POLICE COURT.

See POLICE COURT.

CERTIFICATE.

See ACKNOWLEDGMENT.
As to U. S. documents: See EVIDENCE, 3, 4.
As to deed: See EVIDENCE, 15.

CHALLENGES.

See JURY.

CHANCERY.

See EQUITY JURISPRUDENCE.
As to Old Court of: See EVIDENCE, 18.

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CHARTER OF DETROIT.

As to penal offences: See CRIMINAL LAW, 8.

CHOSE IN ACTION.

Land contract: Assignee. A written contract for the sale of land is such a chose in action as can be sued by the assignee in his own name.

The statute reaches every right in property which was ever assignable in equity, or capable of survivorship to executors. — *Comp. L. § 4159; Sess. L. 1863; Cook v. Bell, 387.*

CIRCUIT COURT.

Declaration: Jurisdiction. The jurisdiction of the Circuit Court depends upon the amount claimed in the declaration — *Merrill v. Butler, 294.*

As to referee's report: See PRACTICE IN CIRCUIT COURT, 1, 7.
When its acts reviewable: See JURISDICTION.
As to power over amendments: See PRACTICE IN CIRCUIT COURT, 4.
See PRACTICE IN CIRCUIT COURT.
See MANDAMUS.

CIRCUIT JUDGE.

See PRACTICE IN CIRCUIT COURT.

CITY OF DETROIT.

As to prosecution under penal laws before Police Central Court: See CRIMINAL LAW, 8.
See MANDAMUS.

COLORED CHILDREN.

See SCHOOLS.

COMMISSIONERS ON CLAIMS.

When their report to constitute the declaration: See PLEADING.

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COMMON CARRIER.

See CARRIER.

COMMON COUNCIL.

See MANDAMUS.
As to contract: See TAX 10.

COMMON COUNTS.

See EVIDENCE, 32.
Confirmation of Report: See EVIDENCE, 19.

CONSIDERATION.

When the fee claimed in a deed is disputed: See EVIDENCE, 5.
Involuntary deed: See DEED, 5.

CONSTITUTIONAL LAW.

1. *Streams within State: Internal police.* Under *Art. 18*, § 4 of the Const. of 1850, which declares that no navigable stream shall be either abridged or dammed, without authority from the Board of Supervisors of the proper county under provisions of law:
Held, That the provisions refer only to such streams as are wholly within the State, and which at any given point must be under the control of one or more boards of county officers The provision relates to the internal police, and does not apply to streams which are State boundaries.—*Ryan v. Brown, 196.*
2. *Held, also*, That the word "abridged" should read "bridged," as the clause was so adopted by the Convention.—*Ibid.*
3. *Legislative interference with University: Validity: Homœopathic professorship: Constitutional law.* A law passed in 1855, (*L. 1855, p. 232*) assumed to limit the power of the regents to regulate and manage the university, by enacting the following proviso: "*Provided*, that there shall always be at least one professor of homœopathy in the department of medicine."

Application having been made for a *mandamus* to compel the appointment of such a professor, the writ was not granted, the court being equally divided upon the question whether the legislature

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had power under the constitution to exercise any such control over the regents, who are vested with "the general supervision of the university, and the direction and control of all expenditures from the university interest fund.—*People v. Regents, 469.*
See TAX.

CONTRACT.

1. *Evidence: Duty of Court.* For the purpose of establishing a contract for the hiring of a certain boat, the plaintiff offered a letter directed to defendant, in which he offered to charter the defendant's boat on specific terms. The defendant replied, by letter, in substance, that he would not like to charter the boat in the manner desired, but preferred to place the tug under plaintiff's control as regarded rates of charge, etc.

To this, plaintiff replied by letter, that he thought favorably of the plan, but desired to have some definite understanding as to what he was to give to defendant, and wished defendant to telegraph him, and whatever he wanted done regarding a bargain, he could do through a Mr. Westover.

Defendant telegraphed plaintiff March 17th, to commence fitting up the boat. Plaintiff thereupon took possession of the boat, fitting her up at his own expense, and used her until the following September, when plaintiff took possession of her.

In an action of Trover, the court charged that the several letters and telegram constituted a contract and entitled the plaintiff to the use of the boat during the season.

Held, that while it was the duty of the court to tell the jury what the correspondence contained, and what it meant, the court erred in determining that said correspondence constituted a contract. While it showed that the parties had begun to make a bargain, it also showed that no bargain was completed.—*Van Volkenburg v. Rogers, 180.*

2. *Agreement to hold stock: Default to keep margin good: Waiver.* The testimony tended to show that plaintiff, on April 18, 1868, employed defendants to purchase certain stock, and to hold it until he ordered it sold. That he paid $750 down, and soon after gave his check on the bank for $250 to keep the margin good; that the check was never paid, and the margin was not kept good. That defendants notified plaintiff they would sell if he did not make it good. That defendants at plaintiff's request agreed to hold the stock until the 18th of May, in the morning; that plaintiff then called at one o'clock, at which time defendants insist that they told plaintiff he would sell; the defendants, as insisted by plaintiff, then agreed to wait until plaintiff returned from his dinner at two o'clock. Defendant sold the

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stock at a loss before plaintiff returned. Plaintiff returned at two o'clock, but made no tender of performance.

The court charged the jury, that if defendant notified plaintiff, as claimed, and that afterwards they agreed with plaintiff to wait until Monday, and that on Monday at one o'clock another arrangement was made to wait until after the plaintiff's dinner, that plaintiff was entitled to a reasonable time to make a sufficient deposit, and that two o'clock was such reasonable time.

That, if the original agreement was, as insisted by the defendants, that they might sell if no margin was put up before Monday, the performance of it was waived by the agreement to wait until plaintiff returned from his dinner.

Held, erroneous. The question was not one of waiver, but whether a distinct agreement was entered into subsequently to, and which varied the terms of the original contract, and which would preclude defendant from selling except under the new agreement. Assuming the defendant's version of the contract, plaintiff had been in default twice. Defendants had notified him of it, and that they must sell the stock unless he made the margin good. If plaintiff acted in good faith in getting the postponement, it must have been to obtain a further deposit.

This was an agreement then made after plaintiff was in default to delay the sale for a definite period, and to take the risk of plaintiff's ability to protect them from loss.

Assuming that defendants were under obligations to wait until two o'clock it does not follow that they incurred any liability by making sale earlier, unless some further act was done by plaintiff. *Kanady v. Burk, 278.*

3. *Fraud:* Complainant entered into an agreement with defendant to purchase of him the "Knapp House property," so called.

The defendant at the time was the owner of a certain triangular peice of land which he purchased of one Knapp, together with several other lots, all of which had been used and occupied as one piece, and been enclosed by a fence for several years before, and which enclosed piece had long been known as the "Knapp House property."

During the negotiation, defendant alluded to the entire piece as the said "Knapp House property," and he knew that complainant supposed and understood that he was purchasing the entire piece so enclosed. In one of the conveyances to complainant, the description, as dictated by defendant, specified two of the lots in said piece, as constituting the whole of the piece known as the Knapp property, and which defendant knew to be untrue.

It further appeared that the entire piece enclosed was occupied by one Reede as tenant, and a mutual arrangement was entered into by all the parties that complainant was to have possession

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of the entire piece. The conveyance delivered to complainant omitted the said triangular piece.

Held, that according to the understanding of the parties, and in fact, the agreement was for the purchase of the "Knapp House property." That complainant believed the deeds he received embraced it, and which the defendant knew they did not, and knew also that complainant was acting upon the faith that they did so, and was thereby deceived.—*Goodenow v. Curtis*, 298.

4. *Costs when one suit to abide the result of another.* Where by stipulation, it was agreed that one of two suits in Chancery, pending in this court, should abide the decision of the other:

Held, that the prevailing party was entitled to the same solicitor's fee in both cases, and in both courts, as well as actual disbursements, except the cost of taking the testimony and printing the record: that being allowed but in one case.—*Chapaton v. Butler*, 337.

Between assignor and assignees: See ASSIGNMENT, 2. 3.
As to correction of mistake: See SPECIFIC PERFORMANCE, 1.
As to entire Contracts; See IBID.
As to change of terms: See EVIDENCE, 21.
For sale of land: See EVIDENCE, 26.
As to altering by parol: See STATUTE OF FRAUDS, 2.
As to collection: See AGENCY.

CONVERSION.

Of logs: See EVIDENCE, 16.

CONVEYANCE.

See: DEED.

COPY.

Effect of admission of: See EVIDENCE, 33.

CORPORATION.

As to specific tax: See EXEMPTION.
See TAX.

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COSTS.

In Mandamus: See MANDAMUS, 3.
See REPLEVIN, 5.

When costs in one suit to abide result in another: See CONTRACT, 4.

COUNTY.

As to liability of towns for bonds: See TOWNSHIP.
See VICINAGE.

COURT.

When evidence fails to sustain the issue, the Court should so instruct the jury.—*G. T. R. R. Co v. Nichol, 170.*
Duty to instruct jury as to legal effect of papers: See CONTRACT, 1.
When to leave to jury the meaning of terms: See Practice in Circuit Court, 6.
See EVIDENCE, 12, 32.

COVENANT.

Action for breach of covenant against incumbrances: Wife's premises: Notice of husband's contract: Implied consent: Notice to purchaser of existing equities. On the 15th of September, 1854, Ralph Eley became patentee of a quarter section of land, embracing the said premises in question, and on the 2d of October, 1855, united with his wife, Mary Eley, in a conveyance of the quarter to one Armenius Eley, who, on the next day, conveyed to said Mary Eley. The deed to Armenius Eley was recorded some thirteen days after its execution, but his deed to Mary Eley was not recorded till the 21st of November, 1859. Shortly after the deed to Mary Eley, and before December, 1855, Ralph Eley established his residence on the quarter, occupied it, erected buildings on it, and deported himself as the owner of the land. Under these circumstances, and while this state of things continued, Ralph Eley in June, 1865, entered into a written agreement with defendant, and one Catlin, providing that they should erect a steam saw-mill on the land, and that on its completion the former should convey the same to them.

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The mill was erected according to agreement, Mary Eley being fully aware of the existence of the agreement, of its provisions and of such performance by defendant and Catlin, and neither suggesting any claims on her part or intimating any objection to what was going on or proposed. Shortly after the completion of the mill, and when by the terms of the agreement for its erection defendant and Catlin had become entitled to a conveyance, Ralph Eley and Catlin fixed upon an arrangement which was never consummated, whereby the former was to have Catlin's half of the premises, and before this arrangement fell through, as it subsequently did, Mary Eley and her husband Ralph, conveyed the other undivided half to defendant, and afterwards, and on the 25th of July, 1857, they mortgaged their interest in the property to one Goodrich, and stated in the mortgage that the mill was owned by the mortgagors and "Catlin and Erwin." About July, 1860, by a decree in chancery against Ralph and Mary Eley designed to enforce the equitable rights of Catlin and Erwin under their contract for the erection of the mill, it was adjudged that the property in question belonged to the latter, and about the same time Erwin acquired Catlin's interest. On the 14th of January, 1861, Erwin conveyed the mill premises to the plaintiff in this suit, by deed containing the usual covenant of warranty and against incumbrances.

The Goodrich mortgage was foreclosed against Ralph and Mary Eley alone, and on May 24, 1861, the title resulting from the foreclosure became vested in one Jennings. Case having entered under his deed from Erwin held exclusive possession until September, 1861, when Jennings claiming under the mortgage title went in without process, and claimed an undivided half of the premises. Case requested Erwin to protect him against the claim of Jennings, which was refused, whereupon he purchased the Jennings claim and instituted this suit on the covenant in the deed against incumbrances.

Held, 1st, that Mrs. Eley, as the holder of the legal title, was not at liberty to assert any right against the equitable claim of Catlin and Erwin to a conveyance, and that both herself and husband were bound, on the completion of the mill and at the time of the Goodrich mortgage, to convey the premises pursuant to the mill contract.—*Case v. Erwin, 434.*

2d. That whatever interest Ralph Eley and wife still possessed was subject to the equities of Catlin and Erwin, and that this interest when conveyed by the mortgage was equally subject to such equities.—*Ibid.*

3d. That the mortgage bore upon its face enough to indicate that Catlin and Erwin had some rights in or to the property, and also to indicate that whatever was conveyed by it, and whether subordinate or not to these rights, was to be ascertained by inquiry; that Goodrich, the mortgagee, was therefore charge-

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ble with notice of the equities of Catlin and Erwin and bound by them, and that Jennings, who held only under the mortgage, was in the like position.—*Ibid.*

2. *Held*, further, that the establishment of the legal title in Catlin and Erwin by the decree in chancery on the foot of their equitable right enured to them as against the mortgage as of the time when they became entitled to a conveyance under their contract; and the mortgage as an incumbrance, and subject to their equities, was altogether cut off.—*Ibid.*

CREDITORS.

Enforcement of legal rights: Reasonable time: Laches: Under a statute designed to produce a speedy determination of all matters involved, the law will not allow a creditor to wait indefinitely without applying to the court within some reasonable time to compel a suit to proceed. And when the rights of creditors have become barred, a receivership, under which nothing has been done for many years, ceases to be operative for any purpose.—*Montgomery v. Merrill, 338.*
See ASSIGNMENT. 2.

CRIMINAL CASES.

Mode of Review: See CRIMINAL LAW, 7.

CRIMINAL LAW.

1. *Accomplice: Cross-examination.* An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he has shown himself guilty.—*Foster v. People, 266.*

2. *Larceny: Evidence.* Evidence that a person charged with larceny has previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.—*Ibid.*

3. *Justifiable Homicide.* There is no positive rule for the definition of justifiable homicide. It must depend upon the circumstances and surroundings of each case.—*Patten v. People, 314.*

4. *Justifiable Homicide: Defense of one's family.* If from defendant's knowledge of his mother's peculiar physical condition, he

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had reason to believe that her life was endangered by riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent as though the danger to her life had resulted from an actual attack upon her person, or as though in the like danger from an attack upon himself; and he was justifiable in using the same means of protection in the one case as the other.—*Ibid.*

5. *Held, further*, that if the noise and tumult of the rioters prevented defendant giving them notice of the danger to his mother, he was excused from doing so.—*Ibid.*

6. *Homicide: Rights of defendant.* The defendant was justifiable in acting for his defense according to the circumstances as they appeared to him; and if from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself, or any member of his family, and he had tried all reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection, and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable.—*Ibid.*

7. *Criminal cases: Mode of review: Writ of Error.* In criminal cases where the proceedings before judgment are sought to be reviewed by the Supreme Court, they are to be certified to this Court by the clerk without the agency of a writ of error, and no assignment of errors is necessary.—*Ibid.*

8. *Central Police Court: Fines: Penal Laws: Library fund.* The prosecutions of offences at the Central Police Court, *chap. 13. sec. 11 City Charter* are to be regarded as prosecutions under the penal provisions of the City Charter, and not under the municipal ordinances, and the fines so collected are to be applied to the support of township libraries.—*People v. City of Detroit, 445.*

As to proof of marriage: See EVIDENCE, 1
As to duty of prosecution in offering proof: See EVIDENCE, 28.
As to challenge: See JURY, 3, 4.

CROSS EXAMINATION.

Of accomplice: See CRIMINAL LAW, 1.
In trial for homicide: See EVIDENCE, 24. 25

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CUSTOM.

As to French Settlers giving to eldest son their farms: See EVIDENCE, 13; and see CARRIER.

DAMAGES.

Value of Real Estate: Evidence. In estimating the value of land at a given time, testimony of its value a few months after, is admissible to go to the jury, as furnishing some means of guidance. It will not be assumed, without proof, that any great change must have occurred in such an interval. — *Abell v. Munson*, 306.

For conversion of certificate of stock: See TROVER.
For defective cars: See CARRIERS, 5.
See REPLEVIN.

DECEASED PERSONS.

As to estates of: See ADMINISTRATOR, 1.
As to assignment of action of tort: See ASSIGNMENT, 4, 5, 6.
See ESTATES.

DECLARATION.

In appeal from Commissioners on claims when report is equivalent to: See PLEADING.
As to jurisdiction: See CIRCUIT COURT.

DECLARATIONS.

By one of several rioters: See EVIDENCE, 22; and see DIVORCE.
See EVIDENCE, 28.

DECREE.

1. *Review: Appeal: Supreme Ct. decree: Laches.* No review can be had of any decree of this court upon the record as it stands. If there can be any opening of a case decided on appeal, it must be for matter of fact newly discovered, and where there has been no laches.

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Decrees of this court are made complete by entry on the journal. No separate signing or enrollment is needed.—*Ryerson v. Eldred*, 490.

2. *Sheriff's execution-deed: Altering decree: Rents of execution-debtor.* When a sheriff's execution deed, under a judgment at law, is made after a decree of this court, it is no ground for altering a provision in such decree requiring tenants to account for rents to the execution debtor.—*Ibid.*

DEDICATION.

As to right of way: See DEED, 2.

DEED.

1. *Sale of land bounded on a street: Right of purchaser to a way.* Where one sells to another a village lot which is described in the deed as bounded on a certain street, the purchaser is entitled as against the seller, to have such street kept open for his accommodation in the enjoyment of his purchase.—*Smith v. Lock*, 56.
2. *Dedication.* The question in such a case is not one of dedication, but of private right, depending upon the construction of the deed of conveyance.—*Ibid.*
3. *Description of premises.* Where definite and permanent boundaries are given, a deed must be considered to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned.—*Gilman v. Riopelle*, 145.
4. *Description for purposes of assessment.* The premises in a tax deed, were described as "that part of private claim 61 lying east of the north branch of the River Ecorse, in township 3 S. of R. 11 E."

   It was objected that this description was insufficient for the purposes of assessment under the tax law of 1843, because not being the subdivision of any section authorized by the United States, for the sale of public lands, it was necessary under section 2 (Laws of 1843, p. 66) "to state the name or number of the lot or tract, or by what other lands it is bounded."

   Held, that the description was sufficient. The requirement that the premises shall be described by the lands which bound them, has reference to those cases in which the tract is not known by name or number, and in which such a description would be most likely to attract the attention of the person interested in the payment of the tax.—*Ibid.*
5. *Voluntary deed: Consideration.* A voluntary deed, without con-

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sideration, can only be avoided by some one having equitie against it.—*Ryan v. Brown, 196.*

As to sufficiency of: See EVIDENCE, 10.
As to possession under tax deed: See EVIDENCE, 8.
When fee conveyed is disputed: See EVIDENCE, 5.
As to mistakes in description of premises in tax deed: See EJECTMENT, 2.
As to description: See DESCRIPTION, 2.
As to correcting mistake by parol evidence: See EVIDENCE, 26.
As to certificate of acknowledgment: See EVIDENCE, 15.
See ACKNOWLEDGMENT.

DEFAULT

See PRACTICE IN CIRCUIT COURT, 3.

DEFENSE.

Of one's family: See CRIMINAL LAW, 4, 5.
Right of defendant in criminal cases: See CRIMINAL LAW, 4, 6; and see EVIDENCE, 24.

DEMAND.

See REPLEVIN, 3.

DEPOSITIONS

1. *Objections as to form: Notice.* When notice of the filing of a deposition has been given, objections as to form cannot be made at the hearing.—*Circuit Court Rule, 54.* It is only in the absence of such notice, that objection can be made on the trial.—*Cook v. Bell, 387.*

2. *Endorsement of return on commission.* When the return to a deposition, taken under a commission, was written upon one of of the sheets appended by the commissioner, instead of being endorsed upon the commission: *Held*, sufficient. The papers may be considered as a single document consisting of various parts, and as well identified in one way as another.—*2 Comp. L. § 5250.—Ibid.*

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DESCRIPTION.

1. *Description of premises in bill of complaint.* Where the description of property in the bill of complaint was such as to point out the premises by a name which was well known, and which distinguished it from others, held sufficient.—*Goodenow v. Curtis, 298.*

2. *Conveyances: Construction of description.* Where a deed conveys lots in a town and refers to a plat to identify them, and in describing their lines calls the points of compass as designated on the plat by its lines and angles, a correct survey cannot be based upon any other system; and although the lines there delineated are not conformable to the true meridian, the plat, and not the compass, should govern.—*Bower v. Earl, 367.*

Of premises in tax deed: See EJECTMENT, 1; and see DEED, 3.
In replevin: See REPLEVIN.
In deed: See EVIDENCE, 26.
See DEED.

DESERTION.

See DIVORCE, 2.

DETINET.

See REPLEVIN.

DETROIT.

See MANDAMUS, 4.
As to colored children: See SCHOOLS, 2.

DISCONTINUANCE.

Effect of on suretie's bond in attachment: See BOND, 1, 3.

DISCRETION.

Of Circuit Court, not reviewable.—*Pearsons v. Eaton, 79.*
Of Circuit Court: See PRACTICE IN CIRCUIT COURT, 3, 5.

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DISTRICTS.

See TAX.

DIVORCE.

1. *Void marriage: Fraud: Satisfactory evidence: Declarations.* To maintain a bill for divorce there must be satisfactory evidence sustaining the charge, irrespective of the declarations, confessions or admissions of the parties.—*Dawson v. Dawson, 335.*

2. *Desertion: Separation.* The separation required to constitute the offense under the law respecting divorce, must be, and continue to be, for the period named, a voluntary breaking off of matrimonial cohabitation by one party against the will of the other, and under circumstances which the law does not consider sufficient to justify it.

   Where, for more than one year of the three and a half years of separation of the parties, the defendant was awaiting trial upon a charge made against her by the now complainant of an attempt to take his life by poison; and when, during the whole period of separation, except ten days, a suit for divorce on complaint of the now defendant was pending upon charges of cruelty and habitual drunkenness of the now complainant, and in which the Circuit Court made a decree divorcing the parties, which this court reversed, and upon grounds in no wise impugning the good faith of that application:

   Held, that this separation of the present defendant from her husband under such circumstances, affords no ground for divorce.—*Porritt v. Porritt, 420.*

As to dismissal of appeal: See EQ. PL. and PRAC. 4.

EJECTMENT.

1. *Tax Title: Improvements: Description.* Under the statue—*2 Comp. L.* § *4603*—permitting the defendant in ejectment, or others through whom he claims, claiming title to lands by a deed of the Auditor General, &c. to recover compensation for improvements made therein, &c.

   Held, That this statute applies only to the lands described in the plaintiffs declaration, and in the deeds, or other instruments through which defendant claims.

   The identity of the lands claimed by the defendant, with those claimed by the plaintiff in his declaration, must be estab-

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lished by the rules of law and evidence applicable to the instruments under which plaintiff and defendant respectively claim, and which they produce in support of their respective titles.—*King v. Potter, 154.*

2. *Held further*, That the plaintiff in this case, having no privity or connection with the defendant or those through whom he claims, and being in no way responsible, either for the description in these tax deeds or the attempt to take possession under them, there is no just principle upon which he can be made to suffer for the mistakes of others through such deeds.

A party purchasing at a tax sale, as between himself and the owner of other lands, is bound at his peril, to take notice of the description in his own deed: and if he or his grantees make a mistake and go on the lands of others, they must bear the consequences.—*Ibid.*

3. *Compensation to defendant for improvements: Statutory title and mesne profits: Set off.* The statute authorizing a defendant in ejectment to claim compensation in certain specified cases, for the value of improvements made by him, confines the privilege to cases where the possession has been held, and the improvements made by virtue of the specific titles mentioned in the statute—*2 Comp. Laws, § 4,603.* It excludes the cases where the defendant claims title in any other way.

Where, therefore, a defendant entered into possession of premises and claimed title thereto, by virtue of several tax titles, and a sheriff's deed under execution sale, and made improvements, and continued in possession during six years, it was held that he did not come within the provisions of the statute—*King v. Harrington, 213.*

4. *Held further*, That though not entitled to compensation for improvements under the statute, yet he might still, by way of set off, obtain compensation to some extent for improvements if the plaintiff should proceed for the recovery of mesne profits.—*Ibid.*

5. *Receivership: Execution-title.* Plaintiff obtained a sheriff's deed on sale of certain real estate under a judgment against a bank for which a receiver had been appointed on the ground of forfeiture of Bank charter. In an action of ejectment to recover said premises under execution title: *Held*, that while a decree of forfeiture if granted, might have related back to the beginning of the receivership, yet without such adjudication, the receiver's title to the bank's assets remained conditional and inchoate, and amounted to but a possessory right for the purposes of the suit. The legal title therefore to said land never vested in the receiver, and it was subject to levy and sale.

Whatever may be the effect of a temporary receivership in creating priorities, or as regards possession, the statute authoriz-

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ing land to be sold on execution, is inconsistent with the idea that as against the debtor himself such a levy would not be good when he has made no assignment to the receiver. When the right of a receiver terminates, and he has made no sale or other legal disposition of the land, the execution-title will stand as if there had been no receivership.—*Montgomery v. Merrill, 338.*

As to proof of documents: See EVIDENCE, 4.
As to hearsay evidence, as to proof of possession: See EVIDENCE, 6.

ENROLLMENT.

Of Supreme Ct. decrees, not necessary.—*Ryerson v. Eldred, 490.*

EQUITABLE ESTOPPEL.

See PAVING, 11.

EQUITY PLEADINGS AND PRACTICE.

1. *Appeal: Waiver: Jurisdiction.* Where a party against whom a decree was made in chancery, undertook to appeal therefrom, but failed to perfect his appeal within the time limited by law it was held that no laches of the opposite party in moving to dismiss could preclude his right to have the case dismissed on that ground.—*Moore v. Ellis, 77.*
2. *Appeal, when dismissed: Duty of appellant as to filing return.* When a party is in default in filing the return to an appeal, and instead of complying with the rule when his attention is called to his default, resists a motion to dismiss, on technical grounds, the court will not aid him—it being a matter of indulgence on their part, and to be exercised only when the defaulting party complies with the rule, after notice.—*Ball v. Ball, 380.*
3. *Bill of review: Decree, mode of entering.* The Circuit Court cannot allow a bill of review upon a decree made by the Supreme Court on appeal. If allowable at all, it must be upon leave granted there.—*Ryerson v. Eldred, 490.*
4. *Divorce: Dismissing case when the purpose of the litigation has terminated.* The wife filed a bill for divorce, and the court granted a limited divorce for one year only, with $250 alimony. The defendant appealed. After the year had expired, the case

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not having been brought to a hearing in the Supreme Court, the complainant petitioned for alimony, and for an allowance for expenses. The record was voluminous, and the court being satisfied that if the cause was proceeded in, an allowance ought to be made to the complainant exceeding the alimony allowed by the court below, refused to retain the case in court, and dismissed the appeal, with costs to complainant.—*Skillman v. Skillman*, *458*.

See DECREE.

As to confirmation of report: See EVIDENCE, 19, 20.
As to description of premises in Bill: See DESCRIPTION.
As to amendments, at the hearing: See AMENDMENTS.
As to review of decree of Supreme Court: See DECREE.

EQUITY JURISPRUDENCE.

1. *Execution sale of interest of one tenant in common of lands* Whether, where the interest of one tenant in common in a part only of the lands held in common is sold on execution, the sale can be declared void, except on behalf of his co-tenant, and on its being made to appear that it would injuriously affect their interests, *quere*.

   One who should subsequently receive from such tenants in common a deed of the land so sold on execution, could not maintain a bill to have the execution sale set aside, on the ground of such an interest in a part of the lands not being saleable; because, *First*, if the execution sale was good, it must stand; and, *Second*, if it was bad, so upon the same grounds would the grant to himself be; and therefore in either contingency he must fail.—*Campau v. Godfrey*, *27*.

2. *Equity Jurisdiction: Trespass: Official oppression.* When a trespass is calculated to do permanent damage to the freehold, the jurisdiction of chancery will be exercised. And where it is an act of official oppression by public officers and agents under color of office, a less grievance constitutes a ground for an interference of equity, than when the trespass is by a private person.—*Ryan v. Brown*, *196*.

3. Mistake as to legal effect of a written instrument constitutes no ground of relief.—*Martin v. Hamlin*, *354*.

When adverse title not basis of suit: See LANDLORD AND TENANT.
As to parties bound by accounting: See ACCOUNTING.

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As to redemption of land after expiration of statutory period: See SALE, 3. 4.
As to mistake in contract: See SPECIFIC PERFORMANCE.
Who may avoid voluntary deed: See DEED, 5.
As to fraud in description of premises: See CONTRACT, 3.
4. Rule regarding effect of parol evidence on written instruments same in equity as law.—*Martin v. Hamlin, 354.*
See COVENANT, 1.
As to paving: See TAX, 4.

ERROR.

Matters of practice constitute no ground of error.—*Final v. Backus, 218.*
See SPECIAL ASSIGNMENT OF.

ESTATES OF DECEASED PERSONS.

As to right of Administrator to sue: See ADMINSTRATOR.
As to effect of Commissioners report: See PLEADING.

ESTOPPEL.

Of Administrator, by acts prior to appointment: See ADMINISTRATOR, 2.
See TAX, 11.

EVIDENCE.

1. *Witness: Proof of marriage of defendant in criminal cases.* In a criminal prosecution the reputed wife of the defendant was called as a witness for the people, under objection, whereupon she testified, in substance, that she was married to the defendant in 1865, and lived with him as his wife; that she was previously married to one Phillips in 1859; that the last time she saw him was in 1860; that she had not heard from him since, but that she had seen a notice in 1862 in the newspaper of the death of a person whom she supposed to be him, and that she informed said Dixon previous to her marriage to him of her relation to said Phillips, and of said death. The prosecution then offered slight evidence, tending to show that a person resembling said Phillips had been seen alive since the marriage to Dixon.

Held, That this evidence made a *prima facie* case of a valid marriage in good faith; since the presumption of innocnce, that she would not willingly commit the crime of bigamy, by marry-

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ing Dixon while Phillips was alive, rendered it obligatory upon the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of the marriage with Dixon. — *Dixon v. People*, 84.

2. *Held further*, that after the prosecution had shown an actual marriage between the defendant and the witness, *prima facie* valid and in good faith, upon which the defendant might reasonably rely as valid, and upon which, on the trial, he did rely and claim as valid, it was not competent for the prosecution to introduce opposing testimony for the purpose of establishing in this collateral manner the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant. The marriage was not in issue, and the pleadings gave defendant no notice that such a question was to be tried. and he cannot be called upon thus suddenly and unexpectedly to meet the question. — *Ibid.*

3. *Authentication of U. S. documents: Certificate: State Law.* The mode of authenticating the documents, records and proceedings of any of the departments, or courts of the United States is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of a state. — *Gilman v. Riopelle*, 145.

4. *Official certificate: Evidence to what extent.* In an action ef ejectment, a paper purporting to be a copy of a surveyor's field notes on file in the United States Land Office, and referring to several distinct land claims, was offered in evidence, under an objection that the official certificate attached did not cover all of the claims contained therein.

Held, that it does not follow that because something is incorporated in such a paper which the certificate does not cover, the paper is to be wholly excluded.

The fact that a portion of the recitals are not authenticated may be a sufficient reason why such portion should not be read, but cannot constitute a ground for rejecting another and entirely distinct and separate portion which is properly authenticated. — *Ibid.*

5. *Consideration in conveyance: Value of premises.* Where the question in dispute is, whether a quit claim deed conveyed the fee in the land described, or a leasehold interest only, it may be proper to put in evidence, to show that the real value of the land was many times greater than the consideration stated in the deed. — *Ibid.*

6. *Hearsay: Proof of tenancy.* Where in ejectment one party claims that a person who had been in possession of the land in dispnte occupied, as owner, while the other claims that he was in under a contract of lease, it is proper for the latter to give evidence of a conversation between a claimant to the land and such person,

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before the latter took possession, tending to show negotiations for a leasing by him. Proof of such a conversation would not be hearsay, and it would be as competent to make it by a by-stander as by the parties thereto.—*Ibid.*

7. *Evidence of motive.* A witness cannot be asked why another party "wished" a certain act done which he directed, unless some statement of his purpose or motive accompanied the direction.—*Ibid.*

8. *Tax-titles based upon unpaid taxes by one in possession.* A deed given on a sale of lands for taxes cannot be excluded as evidence, on the ground that the tax purchaser was in possession when the tax accrued, if the fact of such possession is in dispute, and not admitted by the claimant under the tax title.

Nor if the possession, at the time, were undisputed, would it be sufficient ground for rejecting the deed, as that fact would go to the validity of the deed, and not to its admissibility.—*Ibid.*

9. *Tax-title: Statute of limitations: Possession.* The ten years limitation in the tax law of 1842—*Laws of 1842, p. 133*—does not apply in favor of a party who was in possession under some other claim, at the time of obtaining the tax title. It intends that the party who seeks the benefit of the limitation shall enter, or shall have entered, into the actual possession under his tax deed.—*Ibid.*

10. *Held, also,* that this is an objection going to the effect and sufficiency of the deed, and not to its admissibility.—*Ibid.*

11. *Agency: Province of Court.* A person in the employ of the Grand Trunk Railway Company as station agent at Port Huron, in a suit for extra services, testified under objection as to what one Christie, another agent of the company, had told him would be done in case he preformed certain extra duties.

At this stage of the case there was no evidence that the agency of the said Christie extended to the said subject matter.

Held, the testimony was incompetent.—*Grand T. R. R. Co. v. Nichol, 170.*

12. Where the testimony in a cause fails to make a case of liability against the defendant within the issue, it is the duty of the court to so instruct the jury.—*Ibid.*

13. *Custom as to gift of land to eldest son.* Evidence of a custom among old French settlers to give their farm to eldest sons, is not admissible to establish such a gift in a particular case, where no direct evidence of the gift had been given.—*Gilman v. Riopelle, 145.*

14. *Presumption as to existence of on the trial: Record.* Where no objections were made to the introduction of certain deeds: *held* that this court would not consider the objection that it did not appear that the grantors in the deeds owned the land described

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therein; and the Court will not assume, in the absence of evidence in the record, that their relevancy did not appear.—*Final v. Backus*, 218.

15. *Conveyances: Title of acknowledging officers: Certificate of execution.* The only description of official character of the person acknowledging a deed in New York, was "J. P." appended to his name.

The certificate prescribed by statute as to execution of deeds in other states was attached, and in due form, and also containing an attestation of the official character of said acknowledging officer as a Justice of the Peace. *Held* competent evidence.—*Ibid.*

16. *Trover: Time of conversion: Value.* Prior to the assignment of the right of action in this case, certan logs were removed from Sanilac county, the place of cutting, to an adjoining county (Saginaw) and there manufactured into lumber.

In an action of trover for their conversion, the plaintiff offered evidence tending to show the value of the logs in Saginaw. *Held* competent.

Although the owner of the land from which they were taken might have treated their removal as a conversion, he was not compellable to do so, but could have followed the logs and reclaimed them at Saginaw.

The plaintiff, therefore, had a right to treat the time of the manufacture of the logs into lumber, as the period of conversion.—*Final v. Backus*, 219.

17. *Written evidence: Oral evidence to the same point, effect of.* Where written evidence was introduced, showing the time of the purchase of certain land upon which a trespass had been committed, and oral evidence to the same point was admitted; *held*, that though unnecessary it could not prejudice the defendant.—*Ibid.*

18. *Old Court of Chancery: Foreclosure proceedings: Jurisdiction.* By the law of 1847, the office of Chancellor of the old Chancery Court, was abolished: but the "Court of Chancery" was retained. By the revised statutes of 1847, all new chancery business was conferred upon the "Circuit Courts in Chancery." The Supreme Court was empowered to wind up the business pending in the old Court of Chancery, and the Circuit Courts had exclusive jurisdiction in all other chancery cases. The former court continued such jurisdiction until January 1, 1852:

In a foreclosure suit commenced in 1846, in the old court of chancery, in Wayne Co. where the premises were—*Held* that the tribunal provided for by the act of 1847 retained complete and exclusive jurisdiction over the case until after January 1, 1852.—The records in said court showed that the notice of sale made in 1850 was made by virtue of a decree of "the Circuit Court

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in Chancery, in the county of Washtenaw," that the recitals in the master's deed were in the same form, that the report of sale was entitled in the same way, and addressed to said court, and that all the proceedings of the master purported to relate to a case pending in that court, and not in the "Court of Chancery."

Held further, that the written evidence of said proceedings denote that they pertained to the said Circuit Court, and not to the old Court of Chancery.—*Richards v. Morton*, *255*.

19. *Foreclosure: Confirmation of report: Evidence of title of purchaser at foreclosure sale.* It appeared that an ex-parte order was made by said Circuit Court in 1853, when it had complete jurisdiction, allowing a writ of assistance, and reciting that it appeared by affidavit on file, that Rawson, who was in possession of the mortgaged premises, "had been served with a certified copy of the order confirming the master's report of the sale."

Held, that said order did not operate as a confirmation of the proceedings, and therefore the equity of redemption was not barred.—*Ibid.*

20. *Held further*, that defendant, Morton, who claimed the premises as vendee of Edmonds, who was the purchaser of them at the alleged foreclosure-sale succeeded to all the rights of said Edmonds, as owner, by virtue of said purchase, of the mortage sought to be foreclosed; that said complaintants were entitled to redeem said mortgage, and to have an account as to the amount dne thereon.—*Ibid.*

21. *Statute of frauds: Land contract: Parol evidence: Time of performance.* Under the statute of frauds, which requires all contracts for the sale of lands to be in writing, and makes them void if not written and signed by the vendor, parol evidence cannot be received to show a subsequent verbal agreement to change any of the terms, as no part of the contract can rest in parol.

And where a contract fixes expressly the time of performance, it binds the parties, and no inquiry can be made as to what would have been a reasonable time for such performance. — *Abell v. Munson*, *306*.

22. *Homicide: Riotous assembly: Duty of prosecution in offering proof: Declarations: Right of defence: Cross-examination.* On a trial for homicide, where it appeared that the riotous assembly (of which the deceased was one) gathered at the time, grew out of and was connected with one which had assembled there the night before, and with the same object — it was held that all the proceedings and objects of both gatherings, together with the provocation to the defendant and his acts, constituted together one entire transaction. — *Patten v. People*, *314*.

23. *Held, further*, that as the homicide resulted directly from said assemblages, and their riotous conduct, it was the right and duty

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of the prosecution to show the transaction as a whole, its nature, and its objects, whether tending to show the guilt or innocence of the defendant.—*Ibid.*

24. *Held, further*, that whether the prosecution failed to do so or not it was the right of the defendant, either by cross-examination or by his own witnesses, to go fully into all matters, thus constituting the *res gestæ*, and to show any act or declaration of any one of either assemblage, in furtherance of the common object, or in reference to it, from its inception to its close — the combination once being shown. — *Ibid.*

25. *Cross-examination: Res Gestæ.* A witness for the prosecution (one of the rioters,) having testified fully in reference to the proceedings of the first night, and that defendant had confessed to having struck deceased on the second night, denied on cross-examination, that he had stated to different persons soon after, that he was present as a horner, but was only a mere looker on, and took no part in the matter whatever.

The court refused to permit the defendant to contradict said testimony.

Held, that said statements related to the *res gestæ*, and their contradiction was competent. — *Ibid.*

26. *Agreement: Parol evidence: Deed: Description: Mistake as to legal effect.* Complainant entered into a verbal agreement with defendant to purchase of him a farm occupied by him, and well known to both; but which had never been surveyed. A few days prior to the execution of the deed and mortgage and notes for purchase money, defendant verbally represented the land to complainant as containing 110 acres, and that he would warrant that quantity; and it was also verbally agreed that complainant should get the land surveyed, and if the amount fell short, the deficiency should be endorsed on the mortgage.

The description in the deed, a warranty, was, according to the government subdivisions, and it called for 110 acres.

No fraud or mistake is charged by complainant. Upon a survey made some months after, a deficiency of 16¼ acres was discovered.

In a bill to compel defendant to endorse upon the mortgage the amount of said deficiency:

Held, that the verbal agreement was merged in the deed, and must, in the absence of fraud, be presumed to contain all the terms finally agreed upon. — *Martin v. Hamlin*, 354.

27. *Held, further*, that the said parol agreement would contradict and vary the notes and mortgage given by complainant, as part of said transaction, and that this rule of evidence applies as well in equity as at law. — *Ibid.*

28. *Statements by grantor in disparagement of title.* When certain statements were made by a prior grantor, while in possession of

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certain premises, concerning the extent of his holding, and the place of the dividing line between him and his neighbor, in a trial of title where a subsequent grantee was a party; *held*, that while they could not prove the actual title, they were competent to explain the nature and extent of said grantor's possession, as being part of the *res gestæ*. — *Bower v. Earl*, 367.

29. *Grant of part of large tract: Change of possession: Evidence of ownership.* When there has been an actual delivery of possession of premises given by a grantor to a grantee, purporting to be for the purpose of carrying the grant into effect, and when such premises delivered are but a portion of a larger tract owned by the grantor, his retention up to a certain line, and his surrender beyond it, indicate that he claimed ownership to that boundary, as the true line of the grant, and denies his grantor's title to all within it. — *Ibid.*

30. *Change of possession: Occupancy: Adverse possession: Undisputed tenancy.* In such case the retention of the part not delivered is a distinct occupancy, and as a possession stands on the same footing as if held by any other person than the grantor. A right of action would at once arise in favor of the grantee claiming such land against such occupant; and that right, where the latter does not in the interval admit it in fact, or by implication of law, would become barred by the lapse of the statutory period of limitation. — *Ibid.*

31. Where possession has been thus held for the statutory period, unless it is shown to have been virtually a tenancy undisputed by the tenant at some time in the interval, the bar is complete. — *Ibid.*

32. *Set off: Pleading and evidence: Instruction of jury by court.* Plaintiff below declared upon a special contract for services performed, and also under the common counts.

After introducing evidence tending to prove the special contract he rested, and defendant offered evidence, under his notice of set off, of certain moneys received by plaintiff for him—but which was rejected.

On the conclusion of the testimony, plaintiff withdrew all claim under the common counts.—Jury found for plaintiff.

The rejection of the set off was erroneous. Plaintiff having given evidence pertinent to the issue under the common counts, the proof was admissible when offered, and as the finding was one which might have rested on the common counts, it was the duty of the court to instruct the jury how to distinguish the evidence applicable to the special and common counts respectively, so as to confine their attention to the proof under the special count. This not having been done, it will not be presumed that the error in refusing evidence of the set off was cured by withdrawing the common counts.—*Kelly v. McKenna*, 381.

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33. *Copy of letter: Admissions.* When a defendant testifying admits that an alleged copy of a letter written by him was substantially correct, it is equivalent to an admission by him, of the fact, and becomes original evidence.—*Ibid.*

34. *Petition for appraisal under General R. R. Law: Map and survey.* Section 19 of the General R. R. Law, as amended, *L. 1859, p. 559, 560*, requires the petition for an appraisal of lands to declare among other things that the company has "surveyed the route of its proposed road, in said county, and made a *map and survey thereof*, by which said route is designated, and that they have located their said road according to such survey and filed certificate thereof," &c.

The "map and survey" required by the statute must be something more than a general outline map giving an approximate idea of the situation of the road, without *the means of fixing each point and course.* The map must embody or be accompanied by such full and accurate notes and data as will furnish complete means for identifying the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt as to where any portion of it is to be found.—*Convers v. Grand Rapids R. R. Co, 459.*

35. *Justices court: Jurisdiction: Replevin: Affidavit:* When nothing appears in a justice's court to impeach the jurisdiction in a replevin case when the affidavit had made out a proper showing, evidence on appeal, that the property involved was of greater value than one hundred dollars, cannot be allowed to overthrow the jurisdiction, and prevent the appeal from being decided on the merits.—*Dinnen v. Baxter, 457.*

As to altering contract by parol: See STATUTE OF FRAUDS, 2.

As to correction of mistake in contract by parol: See SPECIFIC PERFORMANCE, 1.

As to proof of service of notice of trial on appeals: See NOTICE OF TRIAL.

Of Larceny: See CRIMINAL LAW, 2.

As to cross-examination of accomplice: See Criminal Law, 1.

As to value of real estate: See DAMAGES.

See CRIMINAL LAW, 3 to 6.

As to new trial against weight of evidence: See PRAC. IN CIRCUIT COURT, 7.

As to identity of land in Ejectment: See EJECTMENT, 2.

In Divorce: See DIVORCE.

Of forfeiture in collateral proceeding: See STATUTES.

And See PAROL EVIDENCE.

EXECUTION DEBTOR.

As to excessive levy: See SALE 3; and see LEVY.

See DECREE.

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EXECUTION SALE.

Of interest of tenant in common: See SALE, 1.
As to execution title: See EJECTMENT, 5.

EXEMPTION.

Corporation: Special tax: Exemption from general tax. By the laws of 1861 and 1863, under which plaintiff below was incorporated, it was required to pay an annual specific tax of 1¼ per cent. on its paid in capital, and this was to be "in lieu of all other taxes upon all the other property of said Company."

Held, that the company were exempt from all other taxes.— *Le Roy v. E. Saginaw, 233.*

FEE.

In land: See EVIDENCE, 5.

FEES.

When fees in one suit to abide the result of another: See CONTRACT, 4.

FINES.

In Central Police Court: See CRIMINAL LAW, 8.

FORCIBLE ENTRY AND DETAINER.

Tenant at will: Notice to quit. The statute, giving a summary remedy against tenants at will or by sufferance, whose estate has been determined, only allows it when such determination has been by a notice to quit. — *2 Comp. L. § 4985, subdiv. 4; Raynor v. Haggard, 72.*

FORECLOSURE.

As to evidence of title of purchaser: See EVIDENCE 19, 20.
As to Old Court of Chancery: See EVIDENCE, 18.

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FORFEITURE.

Of bank charter: See STATUTES, construction of; and see EJECTMENT.

FRAUD.

In description of premises in deed: See CONTRACT, 3; and see EVIDENCE, 26.
See POSSESSION.

FREEHOLD.

As to trespass by official oppression: See EQ. JURIS. 2.

GENERAL LAW.

As to notice of: See TAX, 2.

GIFT.

As to evidence of: See EVIDENCE, 13.

GRANT.

See STATE; and see SAULT ST. MARIE CANAL.
As to delivery: See EVIDENCE, 29, 30.

HEARSAY.

As to possession: See EVIDENCE, 6.

HEIR.

See ADMINISTRATOR.

HOMEOPATHY.

In Michigan University: See CONSTITUTIONAL LAW, 3.

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HOMICIDE.

See CRIMINAL LAW, 3 to 6.

IDENTITY.

Of lands in tax deed: See EJECTMENT, 2.

IMPROVEMENTS.

As to land claimed under tax title: See EJECTMENT, 1.
As to compensation for: See EJECTMENT, 3.

INJUNCTION.

See TAX, 11.

INSTRUMENTS.

Authentication of U. States records, &c: See EVIDENCE, 3.

INTEREST.

Upon mutual demands: See ACCOUNTING, 2.
On money paid by county for towns: See TOWNSHIPS, 2.

INTERNAL POLICE.

See CONSTITUTIONAL LAW, 1.

ISSUE.

As to proof of: See EVIDENCE, 12.
In appeal from Commissioners: See PLEADING

JUDGE.

See CIRCUIT JUDGE.

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JUDGMENT.

1. *Notice of trial: Motion to set aside.* While a judgment rendered on issue joined without notice of trial or appearance at the trial so far imports regularity as not to be, *ipso facto*, void, still it is irregular and liable to be set aside on motion.—*People v. Bacon, Circuit Judge, 247.*
2. When a party against whom such a judgment has been rendered in his absence, without proof of notice of trial appearing on the files, moves at the first opportunity to vacate it, he is entitled to that relief unless it is then made to appear that notice was in fact given.—*Ibid.*

As to irregular judgment: See MANDAMUS, 1.

When referees report is set aside: See PRAC. IN CIRCUIT COURT, 1.

As to amount on commissioners report, when no declaration filed: See PLEADING.

JURISDICTION.

1. *Waiver of jurisdictional defect.* Want of jurisdiction in a court over the subject matter of a suit, can never be waived by the parties.—*Moore v. Ellis, 77.*
2. *Writ of Error: What acts of Circuit Court reviewable.* The only decisions of a Circuit Court in civil cases which are reviewable upon Writ of Error, are such as arise upon the record, or such as are made the ground of exceptions upon the trial, and become a part of the record by Bill of Exceptions.

There is no jurisdiction in this court to review all acts of a Circuit Court. Some things are entirely matters of discretion; and those which do not rest in discretion, but yet form no part of the regular record, can only be reached by some other form of writ, and not by writ of error.—*Pearsons v. Eaton, 79.*

As to declaration: See CIRCUIT COURT.

As to Water Craft: See SUPREME COURT.

See EQ. JURIS. 2.

See JUSTICE'S COURT.

See EQ. PL. AND PRAC.

As to appellate: See MANDAMUS.

JURY.

1. *In special proceedings: Presence of court.* The statute—*Laws of 1864, p. 14*—providing for an order by the court for a drawing

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of a jury and the issuing of the venire in appraisal of rail road lands contemplates that such drawing, etc., shall be made in the presence of the court at the time of making the order, and a jury drawn subsequently to the order and not in the presence of the court is illegal.—*Converse v. G. R. R. R. Co. 459.*

2. *Vicinage: County.* When the names of jurors are required to be drawn from the box, the "vicinage" from which they are to be summoned, means the county, and not the town or neighborhood in which the land to be taken lies.—*Ibid.*

3. *In other than criminal cases: Peremptory challenge.* Challenge for cause may be made to jurors summoned under the railroad law, to assess damages, but peremptory challenges are not allowed in such proceedings. No peremptory challenge lies in any but criminal proceedings, except where given by statute, and in these special proceedings no provision has been made for them.—*Ibid.*

4. *Special cases: Peremptory challenges.* The statute—*2 Comp. Laws, § 4,400*—allowing two peremptory challenges in "civil cases" does not apply to special proceedings, not in the ordinary course of law.—*Ibid.*

See COURT.
See RIPARIAN RIGHTS.

JUSTICE'S COURT.

As to Jurisdiction: See EVIDENCE, 35.

LACHES.

In moving to dismiss appeal: See EQ. PL. & PRAC, 1
By Creditors: See CREDITORS.
See DECREE.

LAND CONTRACT.

Assignee may sue on: See CHOSE IN ACTION.
See EVIDENCE, 21.

LANDLORD AND TENANT.

Purchase by tenant of adverse claim. One who is in possession of land as tenant of another, cannot buy in an adverse title which

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existed at the time he received his lease, and make such purchase the basis of a suit in equity to quiet his title as against his landlord. The possession acquired by means of the lease must be surrendered before the tenant is in position to dispute the title under which he entered.—*Ryerson v. Eldred*, 12.

LARCENY.

See EVIDENCE, 2.

LEASE.

As to possession in adverse title: See LANDLORD AND TENANT. When fee in a conveyance is in dispute: See EVIDENCE, 5.

LEVY.

Excessive levy upon lands, remedy for. One who complains of an excessive levy upon his lands, should move for relief in the court which issued the execution, instead of proceeding by bill in equity.—*Compau v. Godfrey*, 27.
See EJECTMENT, 4, 5.

LIBRARY FUND.

As to fines in Central Police Court: See CRIMINAL LAW, 8.

LIMITATION.

See STATUTE OF.

MANDAMUS.

1. *Irregular judgment.* A mandamus is the proper remedy to compel circuit judge to set aside such a judgment as this, where he has denied a proper application.—*People v. Bacon*, 247.
2. *Appellate Jurisdiction.* Where a mandamus issues to direct the action of a legal tribunal proceeeding in the course of justice, it is an exercise of supervisory judicial control, and is in the na-

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ture of appellate action. In other cases, it is generally, if not always, an exercise of original jurisdiction.

The writ, therefore, in this case should be regarded as directed to the judge officially, and as binding the incumbent, whoever he may be, and not merely the judge who denied the application and has since ceased to hold the office.—*Ibid.*.

3. *Costs.* When the writ relates to proceedings in a cause, the party sustaining the action complained of, and resisting the granting of the writ, is to all intents and purposes represented by the judge, on the motion; he is therefore responsible for the costs.

There is no authority to impose terms when the relator is only obtaining his legal rights: The writ must be unconditional.—*Ibid.*

4. *Public Office; Common Council.* A writ of mandamus is not the proper proceeding to try the right to a public office.—*People v. Detroit, 333.*

5. *Public Schools: Right of parent to the writ.* In an application for *mandamus* to compel the admission of a minor child to the public schools, though the proceeding is for the benefit of the child, the father is entitled to assert the right.—*People v. Board of Education, 400.*

6. *Petition.* Where the petitioner failed to show affirmatively, that the child possessed the necessary qualification; but offered to submit him to the rules and regulations of the board, and was refused on account of his color: *Held*, that the board having made this the sole objection, the relator, should this fail, is presumptively entitled to this writ.—*Ibid.*

MAP AND SURVEY.

See EVIDENCE, 34.

MARRIAGE.

Proof of in criminal cases: See EVIDENCE, 1.

MESNE PROFITS.

See EJECTMENT, 4.

MINOR.

As to Minor's Bounty: See AGENCY, 1.
As to settlement for damages: See AGENCY, 2.
See MANDAMUS.

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MISTAKE.

Mistake as to the legal effect of an instrument, constitutes no ground for relief.—*Martin v. Hamlin*, 354.
In contract for sale of lands: See SPECIFIC PERFORMANCE, 1.
In description in tax deed: See EJECTMENT, 2.
In deed: See EVIDENCE, 26.

MONEY HAD AND RECEIVED.

The action for money had and received does not depend upon any preliminary agreement, but upon the receipt of money, by one, that he is bound to pay over to another.—*Spencer v. Towles*, 9.

MORTGAGE.

Given to secure partnership debt: See PARTNERSHIP.

MOTIVE.

As to proof of: See EVIDENCE, 7.

NAVIGABLE STREAMS.

Within the state: See CONSTITUTIONAL LAW, 1.

NAVIGATION.

See RIPARIAN RIGHTS.

NEGLIGENCE.

In redeeming land: See SALE, 4.

NEW TRIAL.

When referee's report is set aside: See PRAC. IN CIRCUIT COURT, 1.

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Discretion of Court: See PRAC. IN CIRCUIT COURT, 5.
As to referees report: See PRAC. IN CIRCUIT COURT, 7.

NON SUIT.

See REPLEVIN, 1.

NOTICE.

As to purchaser: See ASSIGNMENT, 2.
As to description of land in tax deed: See EJECTMENT, 2.
Of Trial: See JUDGMENT, 1.
Of filing of depositions: See DEPOSITIONS. 1.
Of public law: See TAX, 2.
See COVENANT, 1.

NOTICE OF TRIAL.

In appeal cases: Absentees: Proof of notice under Rule 10. Under Circuit Court Rule 10, providing for notices of trial in appeal cases, when a party is absent, to make such notice valid, it must appear by legal proof, that the residence of the party to whom such notice is directed could not be ascertained after diligent inquiry; and that the notice was posted up in the clerk's office for the required period in some conspicuous place, and proof must appear of the place of such posting.

Every clause and condition of the rule is to be regarded as having some significance; and no presumption can be made to aid a statement which omits any essential particular.—*People v. Bacon, 247.*

See JUDGMENT.

NOTICE TO QUIT.

See FORCIBLE ENTRY AND DETAINER; and see JUDGMENT.

OBSTRUCTIONS.

See RIPARIAN RIGHTS, also SAULT ST. MARIE CANAL.

OCCUPANCY.

See EVIDENCE, 29. 30.

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OFFICER.

As to signature to certificate: See EVIDENCE, 15.

OFFICIAL OPPRESSION.

See EQ. JURIS. 2.

ORAL EVIDENCE.

See EVIDENCE, 17.

OWNERSHIP.

As to effect of surrender of part of premises: See EVIDENCE, 28.

PARENT AND CHILD.

See MANDAMUS.

PAROL EVIDENCE.

See EVIDENCE.
As to representations: See PRACTICE IN CIRCUIT CT. 6.
As to changing terms of contract: See EVIDENCE, 21.
As to mistake in deed: See EVIDENCE 26.
As to altering contract: See STATUTE OF FRAUDS, 2.

PARTIES.

When bound in accounting: See ACCOUNTING.
When father to sue for minor's money: See AGENCY, 2.
Effect on bond of change of, in attachment: See BOND, 1, 2.

PARTNERSHIP.

Mortgage: Individual liability. Harrison W. and Chauncey S. Goodrich, Jr., in September, 1852, borrowed money of one Fasquelle, and gave him a note or contract under seal for the payment of the same, and which fell due in September, 1865.

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The said note was secured by a mortgage of same date, executed by Goodrich, Sr. and wife, to secure the payment of the same.

Goodrich, Jr., died previous to May, 1862; Harrison W. died in 1864; Goodrich, Sr., died in the life-time of Chauncey, S. Jr., and devised to him the premises mortgaged, to secure the said debt.

The mortgage was foreclosed, and the premises sold September 10, 1860, for $1,242 75; May 10, 1862, the administrator of said Chauncey S., Jr., redeemed the premises by paying the amount due. Subsequently he presented his claim for one-half of the said amount against the estate of said Harrison W. for contribution, and which was allowed by the commissioners.

On the trial of the appeal, the administrator of the estate of said Harrison W., offered to show that said Harrison W. and Chauncey S., Jr., were partners with one Cornelius D., at the date of said note; that said money was borrowed with the knowledge and consent of the partnership, and used for partnership purposes; that said partnership was unsettled and debts due. This was refused, and a verdict rendered for the amount of the claim.

Held, that Goodrich, Sr., must be regarded as having executed the mortgage at the request of Harrison and Chauncey Goodrich, Jr., to secure their debt, of which the note was evidence. Had he been living at the time of the redemption, and had paid the mortgage, he could have sued them for money paid for their benefit, and Chauncey S. Jr., being the devisee of the mortgaged premises, stood in the right of the devisor, and was entitled to recover for the half of the redemption money paid by him as for so much money paid for the use of Harrison W. Goodrich or his estate, — *Goodrich v. Leland, 110.*

PAYMENT.

See BOND, 3.

PAVING.

See TAX.

PENALTY.

See BOND.

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PENAL LAWS.

As to prosecutions before Central Police Court: See CRIMINAL LAW, 8.

PLEADING.

Appeal from allowances by Commissioners: Declaration: Judgment. Where, on the trial in the Circuit Court of an appeal from the allowance of commissioners on claims against an estate, no new issue was formed, and no declaration filed, the report of the commissioners setting forth the nature of the claims, will be considered as the declaration in the case; and any judgment beyond the claims presented to the commissioners is erroneous — *White v. Allen, 194.*

As to when action lies: See MONEY HAD AND RECEIVED.

As to evidence in Bigamy: See EVIDENCE, 2.

As to Declaration: See CIRCUIT COURT.

As to rejection of evidence: See EVIDENCE, 32.

POLICE COURT.

As to fines in the Central Police Court: See CRIMINAL LAW, 8.

POLICE POWER.

See TAX.

POSSESSION.

1. Where one bought certain premises, but, through fraud, a part of them were omitted in the conveyance, and he entered into actual possession of only a part; *held*, that he took possession under his purchase of the whole premises so purchased, and so went into possession of the omitted portion. — *Goodenow v. Curtis, 298.*

2. *Acquiescence as to possession.* The acquiescence which will prevent the running of the statute must be that of the possessor in the owner's claim, and not that of the owner in a possession not acknowledged to be held under him.

Acquiescence which is merely inaction on the part of a claimant is the very thing which the statute contemplates as creating

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the limitation which cuts off the right of action. — *Bower v. Earl*, 367.
Proof of in ejectment: See EVIDENCE, 6. 29. 30.
As to extent of grant: See *Ibid.* 28.
As to change of: See *Ibid.* 29.
As to adverse: See *Ibid.* 29.
Under adverse title: See LEASE.
Under tax title: See EVIDENCE, 8, 9.

PRACTICE IN CIRCUIT COURT.

1. *Report of Referees: Effect of being entirely set aside: New trial.* A referee's report entirely set aside, leaves the cause as though it had never been tried, and there is left neither evidence nor finding on which the court can act: but the issue of fact requires a new trial before any judgment can be given. — *Rice v. Benedict*, 75.
2. When testimony fails to make a case, court should so instruct the jury. — *Grand Trunk R. R. Co. v. Nichol*, 170.
3. *Setting aside of default: Discretion of Court: Common Law Record.* The setting aside of a default, and the proceedings based thereon, by the circuit court pertains exclusively to the practice of such court, and forms no part of a common law judgment-record. It constitutes no ground of allegation of error. — *Final v. Backus*, 218.
4. *Amendments: Power of Circuit Court: Names of Party.* Under the Statute—*2 Comp. L.* § 4415—allowing amendments, the circuit court has power to permit the incorrect statement of the name of a party to the record, to be amended.

   In this case, the plaintiff's name was erroneously stated in the writ as "Absolem Baxter," instead of "Absalom Backus." — *Ibid.*
5. *New Trial: Discretion of Court: Record.* The granting of motions for new trials is in the discretion of the court, and, constitutes no part part of the record. — *Ibid.*
6. *Practice in Circuit Court: Meaning of representations: Jury.* Where there was parol evidence given that a party on transferring a note, represented the note to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not to be presented at once, and the evidence of solvency was conflicting, it was properly left to the jury to determine the meaning and extent of these representations, to ascertain whether they are true or not. — *Abell v. Munson*, 306.
7. *Circuit Judge: Power over a Referee's Report: New trial.* A circuit Judge has no power to order a new trial — on the ground that a referee's report is against the weight of evidence.—*First National Bank v. Wayne Circt. Judge*, 483.

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As to duty of Court: See EVIDENCE, 32.
When commissioners' report treated as the declaration: See PLEADINGS.
As to objections to depositions: See DEPOSITIONS.
As to irregular judgments and motion to set aside: See JUDGMENT, 1, 2.
See WRIT OF ASSISTANCE.
See COURT.
See LEVY.
See DISCRETION.

PRACTICE.

In Equity: See EQUITY PLEADING AND PRACTICE.
In Circuit Court: See PRACTICE IN CIRCUIT COURT.
See SUPREME COURT, 1.

PRESUMPTION.

Of innocence: See EVIDENCE, 2.
Of performance of duty by administrator: See ADMINISTRATOR, 3.
Of evidence of a fact: See EVIDENCE 14.

PROPRIETARY RIGHTS.

See STATE.

PUBLIC OFFICERS.

As to official oppression: See EQ. JURIS.

PUBLIC SCHOOLS.

See SCHOOLS.

PURCHASER.

See ASSIGNMENT, 2. And See COVENANT, 1.
See EVIDENCE, 20.

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RAIL ROAD.

As to lands taken: See EVIDENCE, 84.
See JURY.

REAL ESTATE.

As to value: See DAMAGES.
As to trusts: See TRUST.

REASONABLE TIME.

As to action of creditors: See CREDITORS.

RECEIVER.

See STATUTES, construction of; and see EJECTMENT, 5.
See CREDITORS.

RECITAL.

In Report: See EVIDENCE, 19.

RECORDS.

As to proof of U. S. documents: See EVIDENCE, 8.
Where part of the recitals may be read: See EVIDENCE, 4.
As to common law record: See PRAC. IN CIRC'T CT, 3. 5.
Granting new trials, no part of record. See PRAC. IN CIRC'T CT., 5.
Presumption as to: See EVIDENCE, 14.
See WRIT OF ERROR.

REDEMPTION.

As to negligence in redeeming lands after sale: See SALE, 4.

REFEREE.

As to effect of setting aside report: See PRACTICE IN CIRCUIT COURT, 1.

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See BILL OF EXCEPTIONS, and see SPECIAL ASSIGNMENT.
As to power of Circuit Judge over report: See PRACTICE IN CIRCUIT COURT, 7.

REGENTS.

See CONSTITUTIONAL LAW.

REPEAL.

See STATUTES, construction of.

REPLEVIN.

1. *Non-suit: Assessment of value of property: Jury.* Where a defendant in Replevin recovers judgment by nonsuit, or discontinuance, and elects to take judgment for the value of the property taken, and subsequently under a notice of trial, has the *value* of such property assessed by the court without a jury.

   Held, competent *See Laws 1865, p. 325.*) The intervention of a jury is required only where *damages* are sought to be assessed.—*Pearsons v. Eaton, 79.*

2. *Description.* Where the writ and declaration in replevin described the property as "six oxen," held sufficient.—*Farwell v. Fox, 166.*

3. *Detinet: Demand.* Under the statutes of Michigan the action of replevin is always in the detinet, whether the taking be wrongful or not. Where, therefore, the taking was wrongful, and the plaintiff establishes his right to the property, his action cannot be defeated by a failure to make a prior demand; such failure not going to the right of action.—*Le Roy v. E. Saginaw, 233.*

4. *Assessment of value.* In replevin, when the property has been delivered to the plaintiff, and he recovers a verdict, there is no authority given by the statute either to the court or jury to assess the value of the property so replevined.—*Merrill v. Butler, 294.*

5. *Costs.* Under the Statute, *Comp. Laws*, § *5597*, the plaintiff is entitled to costs, without reference to the value of the property whenever he recovers judgment upon verdict in an action of replevin.—*Ibid.*

See JUSTICES COURT.
As to illegal tax: See TAX.

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REPRESENTATIONS.

When meaning of, to be left to jury. See PRACTICE IN CIRCUIT COURT, 6.

REPRESENTATIVES OF DECEASED PERSONS.

See ASSIGNMENT, 456.
As to actions of tort: See ADMINISTRATOR.

RES GESTÆ.

See EVIDENCE, 22, 25.
As to title: See EVIDENCE, 28.

RETURN.

To depositions, as to mode: See DEPOSITIONS, 2.

REVIEW.

Bill of: See EQ. PLEAD. AND PRAC.
See CRIM. LAW, 7.

RIOTOUS ASSEMBLAGE.

See EVIDENCE, 22.

RIPARIAN RIGHTS.

1. The ownership of lands, bordering upon a stream, extends over the bed to the middle of such stream, when it is a river. Any erection which can lawfully be made in the water, within those lines, belongs to the riparian estate, and the complete control and the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large, to the navigation, and such other use if any, as appertains to the public over the water.—*Ryan v. Brown*, 196.

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2. *Public streams: Encroachments.* In waters whose beds are public property, erections by riparian owners, are unlawful, not because they are nuisances, but because they are encroachments on the public domain. But, when the ownership is private, and the public rights are simply easements, or privileges, the owner may use it as he chooses, subject always to the condition that he does not interfere with the full public enjoyment.—*Ibid.*

3. *Jury: Navigation.* In the case of natural water courses, the extent to which private improvements are compatible with the public use, must depend upon circumstances and must always be a question of fact. The owner's use is *prima facie* lawful.

The right of the public for purposes of navigation must be considered as appurtenant to the ordinary means of navigation, rather than to small and insignificant boats, and it is no nuisance to erect reasonable wharves and similar improvements, as these are essential to modern commerce.—*Ibid.*

4. *State Canal: Sault St. Marie's River: Obstructions.* When certain erections built upon private property for dock purposes, and not encroachments on the natural navigation of the river, were sought to be removed by the "Sault St. Mary's Canal Company," as obstructing its canal navigation:

Held, That erections in the St Mary's River at the head of navigation, and serviceable to navigation, did not become unlawful by the subsequent opening of the canal, and cannot be appropriated or destroyed for canal purposes until paid for by the State. Said canal is in no sense a part of the Ste. Marie's River, but an independent water way to connect the river above the falls with the stream below, and similar to a turnpike.—*Ibid.*

5. *State Rights.* The State has no more right to interfere with private property, without compensation, to make or improve a canal than it has for a road upon land.—*Ibid.*

SALE.

1 *Excessive Levy.* Where the statute gives the execution-debtor a year in which to redeem, after a sale of lands has been made on execution, and he neglects to exercise the right, the sale will not afterwards be set aside on his application, on the ground that the levy was excessive.—*Campau v. Godfrey*, 27.

2. *Redemption in equity after statutory time has elapsed: Negligence.* A party who, through gross negligence or ignorance of the law, fails to redeem lands sold on execution within the time limited by statute, has no claim to relief in equity.—*Ibid.*

When to move to set aside excessive levy: See LEVY.
As to warranty of articles of food: See WARRANTY.
Of land bounded on a street: See DEED, 1.

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Of stock: See ADMINISTRATOR, 1; and see TROVER.
Evidence of title on foreclosure: See EVIDENCE, 19, 20.
As to change of terms of: See EVIDENCE, 21.

SAULT ST. MARIE CANAL.

1. *United States grant to Michigan for Sault St. Marie's Canal, extent of.* The grant to the State of Michigan of land to locate a canal upon, at the Sault Ste Marie, extends only to the military reserve, and does not include private property below it —*Ryan v. Brown*, *196*.

2. *Sault Ste Marie Canal Board: Obstructions.* The Sault St. Marie Canal Board have such a control over the canal and its approaches as to be authorized to remove such obstructions to the legitimate use of the canal as are unlawful. But they have no such judicial authority as to make their finding of any conclusiveness upon the fact of illegality, and, if they interfere with private rights, they act at their peril, and are responsible for their conduct.—*Ibid.*

See RIPARIAN RIGHTS

SCHEDULE.

See ASSIGNMENT, 1.

SCHOOL.

1. *Right of attending School: City of Detroit.* An amendment to the general School Law in 1867, Session laws 1837, vol. 1, p. 42, provided that "all residents of any district shall have an equal right to attend any school therein, provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when expedient."

   Held, that the provisions of the law of 1867, were of universal application to all the school districts of the state, and that there was no intention on the part of the legislature to make an exception of the city of Detroit —*People v. Board of Education*, *400*.

2. *City of Detroit: Colored children.* The city of Detroit is not entirely exempted from the operation of the General School Laws, but is subject to such of their provisions as are not inconsistent with the special legislation regulating the city schools.—*Ibid.*

3. *Held*, further, that under this law colored children were placed

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on the same footing with white children, and admissible on the same terms to all schools.—*Ibid.*
See MANDAMUS.

SEALED INSTRUMENT.

As to sealed note: See STATUTE OF LIMITATIONS.

SEPARATION.

See DIVORCE, 2.

SET OFF.

In ejectment, as to mesne profits: See EJECTMENT, 3. 4.
See EVIDENCE, 32.

SPECIAL ASSIGNMENT.

What is a special assignment of error. Exceptions were taken on a trial before the referee, and a bill of exceptions was duly settled. When the referee had filed his report, exceptions were also taken to that, and upon these and the bill of exceptions a motion was made to set aside the report. The court denied the motion, and the report was confirmed. The party then brought error, and assigned for error that "the court overruled the motion to set aside the report of the referee, and confirmed the same."

Held, that this was not a special assignment of error, within the meaning of rule 12, and therefore could not be considered.—*Altman v. Wheeler*, 240.

SPECIFIC PERFORMANCE.

Correction of mistake: Entire contract: Severance. If a material error in a written contract for the conveyance of lands can be corrected on parol evidence, in a suit for the specific performance of the contract, and performance decreed according to the understanding as found upon such evidence, it should only be done where the mistake is clearly made out beyond cavil—*Youell v. Allen*, 107.

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2. Where complainant contracted for the exchange of a parcel of land owned by him, for two parcels owned by two different persons, and filed his bill for specific performance, alleging that one of the parcels to be conveyed to him was incorrectly described in the contract by mistake, and it appeared that such parcel had been sold to a purchaser not shown to have been aware of the mistake:

Held, That, assuming the proof of the mistake to be clear, there could be no relief as against such purchaser.—*Ibid.*

3. That, as the contract of exchange was entire, and not capable of severance, there could be no relief against the owner of the other parcel.—*Ibid.*

STATE.

Enforcement of State Proprietary Rights. Where the State sets up proprietary rights over property, they can only be maintained upon proof of a valid grant, or legal appropriation upon an inquest in form of law.—*Ryan v. Brown, 196.*

As to right to take property to improve canals: See RIPARIAN OWNERS, 5.

As to power of Sault St. Marie Canal Board: See S. ST MARIE CANAL, 2.

STATEMENTS.

Of grantor as to title: See EVIDENCE, 27.

STATUTES, CONSTRUCTION OF.

Bank charter: Forfeiture: Repeal: Collateral proceedings. Plaintiff obtained a sheriff's deed on sale of certain real estate, under a judgment against the Calhoun County Bank in 1859, and which became operative in 1860.

A Receiver was appointed for the Bank, under the act "to provide for proceedings in Chancery against corporations," in June, 1844, *ex parte*, and before hearing. After qualifying, no proceedings were taken by him, and no assignment was made to him, and he died in 1851; and no further steps were taken in the suit in which he acted by any one, and no claims were presented against the bank.

In 1842 a law had been passed to repeal the charter of said bank, with others, providing, however, for an exemption in case of compliance with certain provisions. The charter of the bank

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expired in 1857, and all rights of action in reference to it under the statute. — *Comp. L § 701* — became barred, more than three months before the plaintiff's deed became operative.

Held, That the said law of 1842 did not repeal the charter so that a forfeiture could be ascertained without judicial sentence, and that therefore the title to land could not be absolutely divested from the bank before a hearing of the proceedings to determine the fact of forfeiture.

Much less could the fact be determined in a collateral proceeding. — *Montgomery v. Merrill, 338.*

STATUTES CONSTRUED OR COMMENTED UPON.

COMPILED LAWS.

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§ 2653; Trusts 343
§ 2187; Regents 482
§ 2729; Certificate to Deed 84
§ 3179; Statute of Frauds 312
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§ 3597; Appeal Bond in Chancery 77
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§ 4250; Depositions 392
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STATUTE OF FRAUDS.

1. *Promise to pay the debt of another.* Where one claimed an interest in certain goods, and agreed not to attach them, in consideration that another claimant who proposed to attach, had agreed verbally to pay him the amount due from the person for whom the goods were bought:

Held, That this was an agreement to pay the debt of another and therefore within the statute of frauds.

The supposed debt subsisted equally after the alleged promise as before, The promise was a mere additional assurance.—*Waldo v. Simonson, 345.*

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2. *Contract: Alteration by parol.* Where, under the statute of frauds, a contract would be void unless in writing, such contract when written cannot be altered by parol.—*Cook v. Bell, 387.*

As to changing terms of contract: See EVIDENCE, 21.

See EVIDENCE, 26.

STATUTE OF LIMITATIONS.

1. An administrator redeemed certain premises on mortgage sale, said mortgage having been given by his testator to secure the debt of another. Subsequently he presented the claim to the commissioners of said person's estate.

Held, that the action was not barred by the statute.

The action arose from the time of redemption, and not from the time when the original creditor's right of action accrued against the debtors, on the note.—*Goodrich v. Leland, 110.*

2. *Held further*, that the note being under seal, an action of debt could have been brought upon it at the time the claim was allowed.—*Ibid.*

As to possession: See EVIDENCE, 30, 31.

As to possession under tax deed: See EVIDENCE, 9.

As to acquiescence: See POSSESSION, 2.

STOCK.

As to suit for, by Administrator: See ADMINISTRATOR, 1.

As to damages for conversion of certificate: See TROVER.

As to agreement to buy: See CONTRACT, 2.

See ESTOPPEL.

STREAMS.

See NAVIGABLE STREAMS AND RIPARIAN RIGHTS.

STREET.

Land bounded on: See DEED.

As to paving: See TAX.

SUBSCRIBING.

As to certificate: See ACKNOWLEDGMENT.

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SUPREME COURT.

Water Craft Law: Jurisdiction: Appeal Cases. The jurisdiction given to this court under the water craft law, *L. 1864, p. 107*, in appeal cases, is none the less to be regarded as properly appellate, because it allows new testimony.

The allegation of tonnage of a vessel in such proceedings is essential to jurisdiction.—*Ganoe v. Robinson, 456.*

Power to review acts of Circuit Court: See JURISDICTION, 2.

When court below must be applied to for writ of assistance: See WRIT OF ASSISTANCE.

As to review of Supreme Court decrees: See EQ. PL. & PRAC. 3. See DECREE.

SURETIES.

Effect on bond of discontinuance in attachment suit: See BOND, 1, 2.

As to not justifying on appeal bond: See WRIT OF ERROR.

SURVEY.

See EVIDENCE, 34.
See DESCRIPTION, 2.

SURVEYOR.

As to proof of field notes: See EVIDENCE, 4.

SURVIVORSHIP.

As to actions of tort: See ASSIGNMENT, 5.

TAX.

1. *Replevin: Property seized for taxes: Public law, notice of.* The Statute—*Comp. Laws § 5008*—provides that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine in pursuance of any law of this State.

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Held, that this provision must be construed as applying only to cases in which a valid tax might, by possibility, have been imposed and collected by regular and proper proceedings under statute authority.—*Le Roy v. E. Saginaw*, 233.

2. *Held further*, that a general law, the collector is bound to take notice of, and it can not avail him that the tax roll did not show that the party taxed was a corporation.—*Ibid.*

3. *Tax Collector, how far protected by regular warrant.* The fact that the tax warrant was regular, upon its face, and disclosed no illegality, cannot afford protection to the collector in this action.

It goes only to the extent of protecting him from personal responsibility as a trespasser or wrong-doer. It cannot be made the foundation of a right or claim against others, nor confer any right of property, which alone is in issue in an action of replevin.—*Ibid.*

4. *Assessments for local improvements: Taxing districts: Frontage: Constitutional law: Uniform rule of taxation.* The provisions of the state constitution requiring a uniform rule of taxation, and cash valuation in the local assessment of property, Const. *Art. 14*, § *11*, *12*, have no application to local assessments for local improvements, such as the grading and paving of a city street, but relate only to the valuation of property, and its taxation for general purposes.—*Motz v. Detroit*, 495.

5. *Apportionment: Taxation.* But apportionment of the burden is a necessary element in all taxation, and any attempt at the exercise of this power, without it, is absolutely void.—*Ibid.*

6. *Paving Assessment: Taxing Power: Police Power: City Charter: Constitutional Law: Interior spaces.* The charter of Detroit provided that the Common Council might cause the streets to be graded and paved, and assess the whole expense of such grading and paving in front of any particular lot, to the center of the street, upon such lot, and make such assessment a lien upon the premises until paid, and also a personal charge against the owner, and authorized a warrant for distress and sale of his goods for the same.

Held, that such assessment cannot be sustained as an exercise of the taxing power of the state, inasmuch as it wholly disregards apportionment.—*Ibid.*

7. Neither can it be sustained as an exercise of the police power of the state, as parties cannot be compelled to make improvements of this character under such power.

8. But the apportionment of the expense of the burden for such an improvement may as properly be made on a ratio of frontage, as on one of valuation, if in the opinion of the legislature the former system is most just and equitable. In such cases there

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must be taxing districts, and the apportionment must be made throughout such districts.—*Ibid.*

9. *Held, further*, that a provision in the charter authorizing the assessment of the cost of grading, paving, &c., of the interior spaces (at the intersection of the streets) upon each block, in such proportion as the Common Council should deem just and equitable, is constitutional.—*Ibid.*

10. *Common Council: Effect of acceptance of contract.* Where the Common Council duly accepted and approved certain paving done in pursuance of a contract entered into between the city of Detroit and certain contractors; in a bill by taxpayers to enjoin the collection of the cost of such work: *held*, that this court has no right to review the decision of said Common Council upon the facts: It not being charged that fraud or mistake has intervened and influenced such decision. So long as the Common Council keep within the limits of their jurisdiction as defined by the constitution and statutes of the state, and the members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the court have no power to control the exercise of their legal discretion, or to overrule or set aside their judgment, but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all of its inhabitants.—*Ibid.*

11. *Effect of petition for paving, on illegal assessment: Equitable estoppel.* Where several taxpayers petitioned the Common Council to cause a certain street to be paved and the paving was completed in compliance therewith, without complaint or objections on their part to the acts of the contractors or the Common Council in relation thereto: *Held*, that they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment for its cost, and to have impliedly, at least, consented that such an assessment should be made.

Whether, therefore, such assessment is legal or not, there is no ground for claiming the interposition of a court of equity to restrain the collection of such assessment by injunction.—*Ibid.*

As to description of land in assessment: See DEED, 4.
On corporation: See EXEMPTION.
See REPLEVIN.

TAX COLLECTOR.

See TAX, 3.

TAX ROLL.

Omission to state character of party assessed: See TAX, 2.
As to protection to collector: See TAX, 3.

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TAX TITLE.

Identity of land must be established by rules of law, applicable to the instruments under which parties claim. — *King v. Potter*, *134*.
As to improvements made on land: See EJECTMENT, 1.
As to mistakes in description of land sold: See EJECTMENT, 2.
As to proof of possession: See EVIDENCE, 8.
As to 10 year limitation: See EVIDENCE, 9.
As to description in tax deed: See DEED, 4.
As to compensation for improvements: See EJECTMENT, 3, 4.

TENANCY.

Proof of, when disputed: See EVIDENCE, 6, 30, 31.
As to undisputed: See *Ibid.* 29, 30.

TENANT IN COMMON.

As to effect of sale of the interest of one in real estate: See SALE, 1.

TENANT AT WILL

See FORCIBLE ENTRY.

TIME.

As to change of, in land contract: See EVIDENCE, 21.

TITLE.

When a claim to land is made under several titles, compensation for improvements, under the statute is not allowed. — *King v. Harrington*, *213*.
When adverse title, basis of suit to quiet: See LANDLORD AND TENANT.
On Foreclosure sale: See EVIDENCE, 19.
As to Execution-title: See EJECTMENT, 5.
As to statements of grantor: See EVIDENCE, 27, 28.
When it enures: See COVENANT, 1.

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TORT.

Assignment of action for: See ASSIGNMENT, 4, 5, 6.

TOWNSHIPS.

1. *County bond: Liability of townships.* The County of Cass, for the purpose of aiding enlistments under the President's proclamation, adopted resolutions providing for the issuing of bonds, and that each town might, if it saw fit, receive a number of them equal to its quota of men, and make its own distribution; and if any town failed in raising its quota, it should retain the bonds and apply them on its proportion of county taxes when redeemable.

   In accordance with said resolution, the various towns received said bonds according to their quota. Subsequently the Legislature legalized the action of the several local bodies, and provided that whenever county bonds had been loaned to any township, the amount of such bonds should be assessed upon such town receiving the same, &c.

   Held, that said bonds must be considered not as created for county purposes, but as lent to the various townships so receiving them, and they were severally bound to raise the money to pay them in full by assessment, without reference to the proportion which the assessable property in the town bears to that of the whole county; and that, though the county was responsible to the holders, yet, as between the county and town, the latter were the principal debtors, and the former only surety. — *People v. Porter & Calvin, 101.*

2. *Held, further*, that any money paid by the county for principal or interest, being money lawfully paid for the use of the towns, entitled the county to interest thereon from the date of its payment. — *Ibid.*

TRESPASS.

As to official oppression: See EQ. JURIS. 2.
As to assignment of action of tort: See ASSIGNMENT, 6.

TRIAL.

Notice of: See JUDGMENT, 1; and see NOTICE OF TRIAL.

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TROVER.

Damages for the conversion of certificate of stock. When a party wrongfully sells a certificate of shares of stock in a corporation, under such circumstances as to make him liable in trover, it is the shares of stock that he is to be considered as having converted, and not merely the paper certificate which represents those shares. He cannot claim, therefore, to be liable only for nominal damages for such conversion. — *Morton v. Preston*, 60.

As to assignment of action of: See ASSIGNMENT, 6.

As to logs, evidence of: See EVIDENCE, 16.

TRUSTS.

Every trust in land ceases as soon as the purposes cease for which it is created.—*Montgomery v. Merrill*, 338.

As to creditors: See ASSIGNMENT, 1.

UNITED STATES.

As to authentication of documents of: See EVIDENCE, 3.

UNIVERSITY.

See CONSTITUTIONAL LAW, 3.

USAGE.

See CARRIER.

See CUSTOM, 1.

VALUE.

Of premises in deed as proof of fee conveyed: See EVIDENCE, 5.

Of logs, in trover: See EVIDENCE, 16.

VICINAGE.

See JURY, 2.

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WAIVER.

Case made: Writ of error. After a case was made and filed, the party making it, sued out a writ of error, and brought the cause on to be heard on the exceptions in the case made.

Held, that he had waived his right to a case made. There being no bill of exceptions, the judgment below was affirmed.—*Hatch v. White, 194.*

As to right to sell stock for want of margin: See CONTRACT, 2.
As to jurisdiction: See JURISDICTION.
See CONTRACT, 2.

WAREHOUSEMEN.

See CARRIER.

WARRANT.

As to protection to tax collector: See TAX, 3.

WARRANTY.

Sale of articles of food for domestic consumption: Implied warranty as to quality. When articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose whether the sale be by a retail dealer or any other person.—*Hoover v. Peters, 51.*

WATER CRAFT

See SUPREME COURT.

WAY.

See DEED

WIFE.

As to her property: See COVENANT.

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WITNESS.

As to marriage: See EVIDENCE, 1.

WORDS.

See CONSTITUTIONAL LAW, 2.

WRIT OF ASSISTANCE.

Writ of assistance, when to issue from Circuit Court. Where a decree was made in this court, requiring the complainant to deliver up the possession of certain premises, and the cause was remitted to the court below for the purpose of an accounting—*Held*, that the application for a writ of possession must be made in the court below.—*Ryerson v. Eldred*, *195*.

WRIT OF ERROR.

Appeal: Justice's Court: Motion to dismiss: Record. A motion to dismiss an appeal from a Justice's Court, for the reason that the sureties on the appeal bond did not justify, is not such a part of the record as is brought up by writ of error.—*Conrad v. Freeland*, *255*.

What it brings up: See JURISDICTION, 2.
When case made is waived, effect of: See WAIVER.
Special Assignment in Criminal cases: See CRIMINAL LAW, 7.

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